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TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1902.

No 632.

THE UNITED STATES OF AMERICA ON THE RELATION OF THE RIVERSIDE OIL COMPANY, PLAINTIFF IN ERROR,

vs.

ETHAN A. HITCHCOCK, SECRETARY OF THE INTERIOR.

IN ERROR TO THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA.

FILED MARCH 11, 1903.

(18,860.)

3701

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In the Court of Appeals of the District of Columbia

THE UNITED STATES OF AMERICA on the Relation of The Riverside Oil Company, a Corporation, Appellant,
vs.
ETHAN A. HITCHCOCK, Secretary of the Interior.
} No. 1264.

a Supreme Court of the District of Columbia.

THE UNITED STATES OF AMERICA on the Relation of The Riverside Oil Company, a Corporation, Petitioner,
vs.
ETHAN A. HITCHCOCK, Secretary of the Interior.
} No. 45343. At Law.

UNITED STATES OF AMERICA, *District of Columbia*, } *ss:*

Be it remembered, that in the supreme court of the District of Columbia, at the city of Washington, in said District, at the times hereinafter mentioned, the following papers were filed and proceedings had, in the above-entitled cause, to wit:

1 *Designation of Record on Appeal.*

Filed November 5, 1902.

In the Supreme Court of the District of Columbia.

THE UNITED STATES OF AMERICA on the Relation of The Riverside Oil Company, a Corporation, Petitioner,
vs.
ETHAN A. HITCHCOCK, Secretary of the Interior, Defendant.
} At Law. No. 45343.

Comes now the appellant and designates the following parts of the record to constitute the record on appeal to the Court of Appeals, viz.:

The petitioner's petition.

Exhibits E, F, G, H, I, J, K, L, M, N (omitting argument). O (omitting argument), S (omitting argument), U, V (omitting argument), W and X.

Omit Exhibits A, B, C, D, P, Q and R; also omit Exhibit T, decision of defendant, now reported in 30 Land Decisions, 550, and Exhibit Y, decision of defendant on review, now reported in 31 Land Decisions, 288.

Include the following:

Rule to show cause and return.

Defendant's answer.

Stipulation of counsel.

Petitioner's demurrer.

Order overruling demurrer.

2 Motion for rehearing of demurrer, and exhibits.

Order overruling motion for rehearing, etc.

Order dismissing petition, noting appeal, fixing bond, etc.

SHIRLEY C. WARD,
JEFFERSON CHANDLER,
JOHN M. THURSTON,
W. C. PRENTISS,
Attorneys for Petitioner.

Copy of above received this 5th day of November, 1902.
H. H. GLASSIE.

3 *Stipulation as to Record on Appeal.*

Filed November 5, 1902.

In the Supreme Court of the District of Columbia.

THE UNITED STATES OF AMERICA on the Relation of The Riverside Oil Company, a Corporation, Petitioner, *vs.* ETHAN A. HITCHCOCK, Secretary of the Interior, Defendant.	At Law.	No. 45343.

It is hereby stipulated between counsel for the appellant and the appellee that in addition to the matters designated by the appellant to constitute the record upon appeal, the following shall also be included, that is to say:

1. In place of Exhibit "A," the clerk shall note that the same is a copy of a deed dated October 28th, 1898, from C. W. Clarke and wife to the United States, reciting it to be the desire of the grantor to relinquish to the United States the thereinafter-described land within the limits of the Cascade Range forest reservation in the State of Oregon, and select in lieu thereof an equal quantity of vacant land open to settlement as provided by the act of Congress of June 4, 1897, and purporting to grant and relinquish to the United States the north half of section sixteen, township thirty-four south, range six east and the southwest quarter of section sixteen

township thirty-five south, range six east and the south half of section thirty-six, township thirty-seven south, range 5 east of
4 Willamette meridian, county of Klamath, State of Oregon, and agreeing to accept in lieu thereof other land to be thereafter selected by the grantor or his assigns, equal in area to that therein relinquished.

2. In place of Exhibit "B," the clerk shall note that the same is a deed dated May 5, 1899, from C. W. Clarke to the United States reciting it to be the desire of the grantor to relinquish to the United States the thereinafter-described land within the limits of the Cascade Range forest reservation in the State of Oregon, and select in lieu thereof an equal quantity of vacant land open to settlement as provided by the act of Congress of June 4, 1897, and purporting to grant and relinquish to the United States the east half of section sixteen, and the west half of section thirty-six in township twelve south, range nine east and certain other lands including the west half of section sixteen and all of section thirty-six township twenty-one south, range seven east of Willamette meridian, containing 12,789.07 acres, situate in the county of Crook, State of Oregon, and agreeing to accept in lieu thereof other land to be thereafter selected by the grantor or his assigns equal in area to that therein relinquished, the said deed being executed and acknowledged by the said Clarke and wife.

3. In place of Exhibit "C," the clerk shall note that the same is an abstract of title to the north half of section sixteen, township thirty-four south of range six; the southwest quarter of section sixteen in township thirty-five south of range six and the south half of section thirty-six in township thirty-seven south of range five, all east of Willamette meridian and containing in the aggregate
5 800 acres in the county of Klamath, State of Oregon, showing a deed dated October 22, 1898, conveying said lands from the State of Oregon to C. W. Clarke and a deed dated October 28, 1898, granting and relinquishing the same by said Clark and wife, to the United States, to which abstract is appended the certificate of C. H. Withrow, county recorder, in and for the county of Klamath, State of Oregon, certifying that the same is a true and correct abstract of all matters and instruments on file in his office.

4. In place of Exhibit "D," the clerk shall note that the same is an abstract of title to the east half of section sixteen and the west half of section thirty-six in township twelve south, range nine east, and other lands, including the west half of section sixteen and all of section thirty-six in township twenty-one south, range seven east of Willamette meridian, in Crook county, Oregon, and showing a conveyance from the State of Oregon to Andrew Anderson of a portion of the land described in said abstract; a conveyance of the same lan ls by Andrew Anderson to A. S. Baldwin; a conveyance dated May 1, 1899, from the State of Oregon to Flora M. Sherman of certain lands in the county of Crook, State of Oregon, including the west half of section sixteen, township twenty-one south, range seven east, of Willamette meridian; a conveyance from the State

of Oregon to A. S. Baldwin of certain land in Crook county, Oregon; a conveyance from the State of Oregon to H. S. Morris of certain land in Crook county, Oregon; a conveyance from A. S. Baldwin and Emma C., his wife, to C. W. Clarke, of certain lands in Crook county, Oregon; a conveyance from H. S. Morris and Mary P., his wife, to C. W. Clarke, of certain land in Crook county, Oregon; a conveyance dated May 4, 1899, from Flora M. Sherman to C. W. Clarke, of certain tracts of land in Crook county, Oregon,
6 including the west half of section sixteen, and section thirty-six in township twenty-one south, range seven east of Willamette meridian; a conveyance dated May 5, 1899, from C. W. Clarke and Philomen, his wife, to the United States, of certain lands within the limits of the Cascade Range forest reservation in the State of Oregon, to wit, the east half of section sixteen, and the west half of section thirty-six in township twelve south, range nine; and other tracts, including the west half of section sixteen and all of section thirty-six in township twenty-one south, range seven, all east of Willamette meridian and containing in the aggregate 12,789.07 acres, situated in the county of Crook, State of Oregon, to which said abstract is appended the certificate of Arthur Hodges, county clerk in and for the county of Crook, State of Oregon, certifying that the foregoing is a true, full and correct copy of all deeds and other instruments in writing on file in his office.

5. The clerk shall include in the record Exhibit "R," the decision of the Commissioner of the General Land Office.

6. The clerk shall include in the record Exhibits "T" and "Y," decisions of the Secretary of the Interior, but it is further stipulated that in lieu of copying said exhibits, the clerk may certify the copies of the same as they appear in the printed pamphlet sheets of the decisions of the Land Department, and that in the Court of Appeals copies of the said printed pamphlet may be incorporated into the printed record for the purpose of dispensing with the additional reprinting thereof.

SHIRLEY C. WARD,
JEFFERSON CHANDLER,
JOHN M. THURSTON,
W. C. PRENTISS,
Counsel for Appellant.

ASHLEY A. GOULD,
HENRY M. GLASSIE,
Counsel for Appellee.

7 *Petition.*

Filed April 16, 1902.

In the Supreme Court of the District of Columbia.

THE UNITED STATES OF AMERICA on the Relation of The Riverside Oil Company, a Corporation, Petitioner,
vs.
ETHAN A. HITCHCOCK, Secretary of the Interior, Defendant.
} At Law. No.—.

The petition of the Riverside Oil Company respectfully represents:

1. That the petitioner is a corporation duly organized and existing under the laws of the State of Nevada, and empowered to acquire and hold land in the State of California.

2. That Ethan A. Hitchcock, the defendant, is the Secretary of the Department of the Interior of the United States of America, duly qualified and acting as such, and has been such Secretary, and acting as such ever since the 20th day of February, 1899.

3. That heretofore, to wit, on the 28th day of October, 1898, one C. W. Clarke, who was at all times hereinafter mentioned a citizen of the United States, was, through mesne conveyances, the owner in fee of the southwest one-quarter of the southwest one-quarter (S. W. ¼ of S. W. ¼) of section 36, township 37 south, of range 5 east, Willamette meridian, in the State of Oregon, containing 40 acres, covered by patent; and to wit, on the 5th day of May, 1899, the said Clarke, through mesne conveyances, was also the owner of the east one-half of the southwest one-quarter (E. ½ of S. W. ¼) and the southwest one-quarter of the southwest one-quarter (S. W. ¼ of S. W. ¼) of section 16, township 21 south, of range 7 east, Willamette meridian, in said State of Oregon, containing 120 acres, also covered by patent.

4. That, to wit, on the 14th day of February, 1893, the aforesaid townships and ranges in which said lands are situate, were, among other lands, by proclamation of the President of the United States, under and by virtue of the act of Congress approved March 3, 1891, (26 Stat., 1095, 1103) lawfully established as and still are a public forest reservation, and designated as the "Cascade Range forest reservation."

5. That by the act of Congress approved June 4, 1897, (30 Stat., 36) it was provided,

"That in cases in which a tract covered by an unperfected *bona fide* claim or by a patent is included within the limits of a public forest reservation, the settler or owner thereof may, if he desires to do so, relinquish the tract to the Government, and may select in lieu thereof a tract of vacant land open to settlement not exceeding

in area the tract covered by his claim or patent; and no charge shall be made in such cases for making the entry of record or issuing the patent to cover the tract selected: *Provided further*, That in cases of unperfected claims the requirements of the law respecting settlement, residence, improvements, and so forth, are complied with on the new claims, credit being allowed for the time spent on the relinquished claims."

6. That the meaning of the words "vacant land open for settlement" as used in the last-mentioned act, and as established by long congressional, judicial, and departmental usage and interpretation, is public land appearing on the records of the Land Department as land not taken by an individual, or as decided by defendant in the case of F. A. Hyde (28 Land Decisions, 284, 287), "*any public land to which rights may be initiated by settlement under existing laws*," and the act in itself prescribes no other condition precedent to selection.

7. That by the amendatory act of June 6, 1900 (31 Stat., 588, 614), it was provided,

"That all selections of land made in lieu of a tract covered by an unperfected *bona fide* claim, or by a patent, included within a public forest reservation, as provided in the act of June fourth, eighteen hundred and ninety-seven, * * * shall be confined to vacant surveyed non-mineral public lands which are subject to homestead entry not exceeding in area the tract covered by such claim
8 or patent: *Provided*, That nothing herein contained shall be construed to affect the rights of those who, previous to October first, nineteen hundred, shall have delivered to the United States deeds for lands within forest reservations and make application for specific tracts of lands in lieu thereof,"

and the petitioner avers that by said last-mentioned act, Congress by limiting the class of lands open to lieu selection to "vacant surveyed non-mineral public lands which are subject to homestead entry," has specifically confirmed the aforesaid construction of the language of the original act of June 4, 1897, and recognized that the words "vacant land open to settlement" mean *even more than* "vacant surveyed non-mineral public lands which are subject to homestead entry," and your petitioner avers that under the law, the practice of the Land Department, and judicial determination, lands returned either as agricultural or mineral in character are enterable under the homestead law until the actual discovery of valuable mineral deposits thereon. (Rule 102, 28 Land Decisions, 610; and sec. 2341 R. S.)

8. That the said act of June 4, 1897, gave the Secretary of the Interior no authority to make regulations in any manner or form respecting the *exchange* of patented lands within the limits of a public forest reserve, for vacant land open to settlement, and the said Secretary of the Interior was wholly without authority to make any such regulations, or impose any conditions upon a selector, and his authority was and is limited to the exercise of his function of determining the sufficiency of the deeds of relinquishment to the Gov-

ernment, and directing the issuance of patents for the tracts selected; yet, nevertheless, on May 9, 1899, (28 Land Decisions, 521, 523), he wrongfully assumed the authority to approve and promulgate certain instructions addressed to the various local land officers, prescribing as requirements and conditions precedent to the relinquishment of forest reserve land, the following:

"In all cases relinquishments made in pursuance of said act must be executed, acknowledged and recorded in the same manner as conveyances of real property are required to be executed, acknowledged and recorded by the laws of the State or Territory in which the land is situated. Where the legal title to the land has passed out of the United States, there must also be filed with the relinquishment a duly certified abstract of title showing that at the time the relinquishment was filed for record the legal title was in the party making the relinquishment and that the land was free from liability for taxes and from other incumbrance,"

and approving a certain form for selection in lieu of the land relinquished, which form contained the recital of the cotemporaneous submission, among other things, of an affidavit "showing the lands selected to be non-mineral in character and unoccupied;" a true copy of which form is as follows:

4–643. Perfected claims.

Selection in Lieu of Land in —— Forest Reserve.

(Act June 4, 1897.)

To the register and receiver, United States land office ——.

GENTLEMEN: I am the owner of the —— meridian, containing — acres; that said land is situate and lying within the boundaries of the —— forest reserve; that I desire to relinquish and reconvey said land unto the United States, and in lieu thereof to select the —— land district, State of ——, and containing — acres, under the provisions of the act of June, 1897 (30 Stat., 36).

In compliance with the regulations under said act I have made, executed, and caused to be recorded in the proper county and State, a deed of reconveyance to the United States of the tract first above described and situate within said —— forest reserve, and in relation thereto have caused a proper abstract of title to be made and authenticated, both of which are herewith submitted.

There are also submitted certificates from the proper officers showing that the land relinquished, or surrendered, is free from encumbrance of any kind; also that all taxes thereon, to the present time, have been paid; and an affidavit showing the lands selected to be non-mineral in character and unoccupied. I therefore ask that United States patent issue to me for the tract or tracts thus selected.

—— ——

Dated, —— —.

9. That the said C. W. Clarke, being the owner of said land covered by patents as aforesaid, within the aforesaid forest reserve, and desiring to accept the offer of exchange made by the United States in and by said act of June 4, 1897, did on the 28th day of October, 1898, execute, in conjunction with his wife, a certain good and sufficient deed in fee, conveying and relinquishing to the United States the said S. W. ¼ of S. W. ¼ of said section 36, township 37 S., R. 5 E., aforesaid, containing 40 acres, and on the 5th day of May, 1899, executed, in conjunction with his wife, a certain other good and sufficient deed in fee conveying and relinquishing to the United
9 States the said E. ½ of S. W. ¼, and S. W. ¼ of S. W. ¼ of section 16, T. 21 S., R. 7 E., aforesaid, containing 120 acres, and caused said deeds to be duly recorded in the respective counties in which the said lands are situate.

That by section 2 of the act of March 3, 1883, (22 Stat., 484), the registers and receivers of local land offices are required, upon application, to furnish official information as to what lands are *vacant*, and what lands are *taken*, and the petitioner avers that on the 14th day of December, 1899, the said C. W. Clarke applied to the register and receiver of the Visalia, California, land office for information as to vacant lands open to settlement in Visalia, California, land district, and was then and there officially informed by said local land officers at Visalia, that the following-described tracts of land, situate in the said Visalia land district, were vacant lands open to settlement, as shown by the tract books and records of said land office, viz, the north one-half of the southeast one-quarter (N. ½ of the S. E. ¼) of section 4, township 29 south, of range 28 east, Mt. Diablo base and meridian, and the south one-half of the northeast one-quarter (S. ½ of the N. E. ¼) of said section 4, said township and range, and thereupon, on the said 14th day of December, 1899, the said Clark delivered and surrendered to the said register and receiver of the said United States land office at Visalia, California, the said two deeds of conveyance and relinquishment, with abstracts of title showing good title to said lands in him the said Clarke, free from incumbrance, and then and there in lieu of said patented forest reserve land, designated and selected the said N. ½ of the S. E. ¼, and S. ½ of N. E. ¼ of said section 4, equal in area to said relinquished lands, and as evidence of such selection, filed with the said register written declarations of such selection, one for the N. ½ of the S. E. ¼, and one for the S. ½ of the N. E. ¼, of said section 4, and, though under no obligation so to do, at the request of the said local land officers filed with each of said declarations of selection an affidavit alleging in effect that said lands were vacant lands open to settlement, true copies of which said deeds of relinquishment, abstracts, declarations of selections, and affidavits, are filed herewith, marked respectively Exhibits A, B, C, D, E, F, G, and H.

And the petitioner avers that when the said deeds of relinquishment were executed, recorded, delivered, and surrendered to the said register and receiver as aforesaid, the said lands so relinquished were free of encumbrance, and by the delivery and surrender of

said deeds as aforesaid, the said Clarke became devested of the title to said lands, and the title in fee thereto *became vested absolutely in the United States*, and the United States can devest itself of the title thus acquired *only* by act of Congress.

And the petitioner avers that the said two tracts of land selected by said Clarke as aforesaid were duly surveyed, among other lands, by the United States surveyor general for the State of California, and duly returned and classified by him as agricultural lands prior to said selections, and at the time of selection by said C. W. Clarke as aforesaid, the said two tracts of land were shown on the books and records of the Land Department as and being agricultural land, not reserved or otherwise closed to settlement, but subject to disposition under the land laws of the United States, and especially under the said act of June 4, 1897, and, at the time of selection by said Clarke as aforesaid, there was upon the records of the Land Department no filing, entry, or claim to said selected lands, and the same were vacant lands open to settlement. And the petitioner, still insisting that the land office records are binding upon the United States, and the Land Department thereof, as to the character of the land, yet further avers that at the time of said selection by said Clarke, there had been no discovery of mineral on said lands, and no mineral was known to exist therein, and the same were in law and in fact agricultural lands, and no valid or legal claim to the same had then or theretofore been initiated, and at the time of said selections the complete title to said lands was in the United States, and the United States were the sole and exclusive possessors and occupiers of the same as part of the vacant public land open to settlement.

10. That by the said relinquishment of said patented forest reserve lands, and the selection of said tracts in lieu thereof as evidenced by the declarations aforesaid, the said Clarke effected and perfected *a valid and binding exchange* of his said patented lands for the lands so selected, exchanging title for title, possession for possession, occupancy for occupancy, and became the owner of said selected lands with general warranty of title from the United States, and entitled to patents therefor without cost. And the petitioner avers that the defendant in his decision rendered July 5, 1900, in the case of *Ex parte* McDonald (30 Land Decisions, 124), held such to be the effect of the said act of June 4, 1897,—

"By his deed of relinquishment and conveyance to the United States of his own land situate within the boundaries of the forest reserve, and by his selection of the lieu land, McDonald accepted the standing offer of the Government contained in the act of June 4, 1897, and complied with its conditions, thereby converting the mere offer or proposal of the Government into *a contract fully executed upon his part, and in the execution of which by the Government he had a vested right.* After McDonald had fully complied with the terms on which the Government by said act had *declared its willingness to be bound, no act* of either the execu-

tive or legislative branch of the Government could divest him of the right thereby acquired,"

and also in his decision rendered July 13, 1900, in the case of Clarke *vs.* Northern Pacific R. R. Co. (30 *id.*, 145, 148), saying,—

"If the lands selected by Clarke were subject to selection at the time he made selection thereof, and if, as appears to have been the case, the lands embraced in his deed of relinquishment and reconveyance were proper bases for his selections, he acquired, *at the time of filing such selections and deeds of relinquishment and reconveyance, vested rights in the execution by the Government of its part of the contract for the exchange of lands.*"

And the petitioner avers that by the act of January 27, 1898, (30 Stat., 234), it was provided that the register and receiver for each land district

"shall have charge of and attend to the sale of public and Indian lands within their respective districts,"

and that upon the delivery and surrender of the said deeds of relinquishment, and the filing of the said declarations of selections as aforesaid, the said register and receiver of the Visalia, California, land office made a further examination of the records of their said office, and, by virtue of the *original* jurisdiction conferred upon them by said act of January 27, 1898, then and there *accepted on behalf of the United States the said deeds of relinquishment, and the said declarations of selections*, and appended to each of said declarations a certificate duly signed by said register, as follows:

LAND OFFICE AT VISALIA, CALIF., *December* 14, 1899.

I, Geo. W. Stewart register of the land office, do hereby certify that the land above selected, in lieu of land relinquished to the United States, is free from conflict, and that there is no adverse filing entry, or claim thereto.

GEO. W. STEWART, *Register.*

and entered the said selected lands upon the records and tract books of their office as *taken* by the said Clarke.

11. That notwithstanding the title of the said Clarke to the said selected lands and his right to patents therefor had become vested by the relinquishment and selection aforesaid, and the said act of June 4, 1897, had guaranteed the selector a patent without cost, yet the Land Department, without authority of law, thereafter required the said Clarke to publish a notice of his said selections for a period of sixty days, and pay for the same, and the register of said Visalia, California, land office under dates respectively of January 21 and 22, 1900, forwarded all the papers aforesaid to the Commissioner of the General Land Office accompanied by letters certifying a second time that the records of his office "*show the lands selected to be free from conflict and subject to such selection*" and reporting that publication had been ordered under circular of the General Land Office of

December 18, 1899, (subsequent in date to the selections by said Clarke aforesaid), true copies of which said letters are filed herewith, marked respectively Exhibits I and J.

12. That although there was no legal obligation so to do, yet the said Clarke complying with the said requirement of publication of notice, caused to be duly published a notice in the manner and form prescribed, whereupon, on February 6, 1900, the Kern Oil Company filed in the said local land office a protest against both of said selections, with accompanying affidavits, a true copy of which is filed herewith, marked Exhibit K.

And on February 12, 1900, J. F. Elwood and others filed in said local land office separate protests against said selections, with accompanying affidavits, true copies of which are filed herewith, marked respectively Exhibits L and M.

That all of said protests were thereupon forwarded to the General Land Office.

And the petitioner avers that the said protests were and are insufficient in form and substance to constitute an issue as to whether or not said lands selected as aforesaid by said Clarke were vacant lands open to settlement at the time of such selections, and that the said protestants, by reason of such non-discovery of minerals in the said lands, were wholly without standing as adverse claimants under the law and practice of the Land Department.

11 And the petitioner further avers that the said protests are also insufficient in form and substance to serve as a foundation for declaring an issue between the United States and the said selector as to the character of the land at the time of selection as aforesaid.

And the said protests being insufficient to raise an issue between either the said protestants, as contestants, or the United States and the said selector, the petitioner thereupon caused to be filed in the General Land Office motions to dismiss the said protests, true copies of which motions are filed herewith, marked respectively Exhibits N and O.

13. That on the 2nd day of January, 1900, the said C. W. Clarke by a certain deed in fee, duly recorded, conveyed the said N. ½ of S. E. ¼, and the said S. ½ of N. E. ¼ of said section 4, to one D. E. Alexander, and thereafter, to wit, on the 7th day of July, 1900, the said Alexander, by a certain deed in fee, duly recorded, conveyed the said lands to the petitioner, true copies of which said deeds are filed herewith, marked Exhibits P and Q, by which deeds of conveyance the petitioner succeeded to, and became vested with, all of the right, title and interest of the said C. W. Clarke in and to the said lands, and is still the owner thereof, and entitled to demand and receive from the United States patents therefor in the name of said C. W. Clarke, and, under the practice of the Land Department, to prosecute and defend in the name of said Clarke, all proceedings in said department involving the said selections, and the petitioner has, through its attorneys, so prosecuted and defended all subsequent proceedings in the Land Department affecting said selections, and

demanded patents therefor, always insisting, however, that the right to patents for said selected lands was vested as aforesaid in said selector Clarke, and could not be defeated by any action of the Land Department.

14. That, at the time of the said selections by the said Clarke, no person or persons had any right, title, or interest, either vested or inchoate, in or to said lands so selected by said Clarke, but each and every of the persons in said protests and affidavits therewith alleged to have been upon the said lands as locators at or before the time of the said selections, and under whom the said protestants asserted pretended rights, were mere pretended explorers for minerals and had made no discovery or discoveries of minerals upon the said lands or any part thereof, but had merely staked off pretended mining claims, for the purpose of deceiving others and discouraging and deterring them from acquiring said lands under the land laws.

That such staking off of pretended mining claims initiated no lawful right, inchoate or vested, for the mineral land law, (sec. 2319 R. S.) does not grant any right of occupation until discovery, and (sec. 2320 R. S.) *prohibits* location before discovery, or, as construed by the Supreme Court of the United States, "*discovery* and appropriation [location] are the source of title to mining claims." (O'Reilly *vs.* Campbell, 116 U. S., 418, and cases cited.)

That the said alleged locators made no discovery or discoveries of minerals upon the said lands, and acquired no possessory or other rights therein or thereto, and, by the alleged attempted conveyances from said alleged locators to the said protestants, the latter acquired no rights whatever in or to the said lands.

That the said protestants never themselves staked or restaked any claim or claims upon the said lands, and do not in the said protests set up any claim of right or title except through and by the said attempted and ineffectual locations and conveyances from the said alleged original locators.

And the petitioner avers that the right to contest in the Land Department the character of the land selected by others is conferred by section 2335 R. S., as follows:

"In cases of contest as to the mineral or agricultural character of land, the testimony and proofs may be taken as herein provided on personal notice of at least ten days to *the opposing party;* or if such party cannot be found, then by publication of at least once a week for thirty days in a newspaper, to be designated by the register of the land office as published nearest to the location of such land; and the register shall require proof that such notice has been given."

And such section contemplates and authorizes hearings only when the adverse party shows a color of title, or right to the land.

15. That on December 18, 1900, the Commissioner of the General Land Office consolidated said two selections, considered them as one case, and rendered a decision in the matter, holding that the title of the selector did not vest until approval by the Commissioner and that "the land in these selections is yet open to exploration under the mining laws, and if at this date the lands are shown to be min-

eral it defeats the selection," and concluding by directing the
12 said local land officers at Visalia, California, to notify the said Clarke that he would be allowed thirty days within which to apply for a hearing, all of which will more fully appear by reference to the said decision, a true copy of which is filed herewith marked Exhibit R.

From this decision and disposition of the case, the petitioner caused an appeal to the Secretary of the Interior to be taken and prosecuted in the name of said selector Clarke, assigning as error among other things, that the Commissioner erred, in not sustaining said motions to dismiss the said protests and passing said selections to patent; in ordering a hearing; in not holding that the showing of the tract books and land records at date of selection, governed the character of the land for the purpose of said selections; in holding that a discovery of mineral upon the lands selected *subsequent* to said selections and before approval by the Commissioner would defeat the same; in calling upon the said selector to demand a hearing and assume the burden of proof upon the question of the character of the land; and in directing that at such hearing, if demanded, the character of the land subsequent to said selections should be embraced in the issue; as will more fully appear by reference to a true copy of said appeal filed herewith, marked Exhibit S.

16. That the title to the said selected lands having vested in the said Clarke *ipso facto* by the relinquishment and selections aforesaid, the only question before the defendant for decision on the said appeal was as to the propriety of the action of the Commissioner of the General Land Office and his authority to take any action other than to pass the said selections to patent. Yet, nevertheless, on the 25th day of April, 1901, the respondent rendered a decision in said matter, a true copy of which is filed herewith marked Exhibit T, wherein he ignored his previous decisions and the real issue presented, and held that questions respecting the class and character of the selected lands are to be determined by the conditions existing at the time when all requirements necessary to obtain title have been complied with by the selector; that the mere recital in the form approved by the respondent (form 4—643, as set out in paragraph 8 hereof,) of an accompanying non-mineral and non-occupancy affidavit constituted a regulation of the department requiring the filing of such affidavit as a condition precedent to the vesting of the selector's title; that such alleged regulation was binding upon selectors of forest reserve lieu land; that the affidavits filed by said selector Clarke failed to allege non-occupancy, and therefore he had not complied with the requirements necessary to obtain title; that *since* the said selections by said Clarke valuable deposits of mineral petroleum oil had been discovered; and that in view of the alleged admitted occupancy *subsequent* to the said selections, and the subsequently discovered value of the land for mining purposes, it was apparent that the required proofs of the then non-mineral character and non-occupancy of the land could not then be supplied,

and that therefore the said selections must be rejected; and by such decision vacated the order of the said Commissioner directing a hearing, and arbitrarily, wrongfully and unlawfully attempted to reject the said selections and destroy the vested rights of the said Clarke and his grantees.

17. And the petitioner avers that a non-occupancy or other affidavit is not required by the said act of June 4, 1897; and neither the defendant nor the Land Department had any authority to demand it; that the form for selection containing the recital of the filing of a non-occupancy affidavit was first issued on or about May 4, 1898, a copy of which form is herewith filed, marked Exhibit U, and, contrary to the cutsom of the Land Department where affidavits are required, no form of such affidavit has ever been adopted or furnished by the said Land Department.

That previous to May 4, 1898, the Land Department had prescribed no form for selection under the said act of June 4, 1897, or required any affidavit, and after the issuance of the said instructions of May 4, 1898, the said Land Department treated the recital of the filing of a non-occupancy affidavit as merely directory, and not mandatory, and patented dozens of forest lieu selections under said act of June 4, 1897, in which no non-occupancy affidavit had been filed or required, and the petitioner avers that the usage and practice of the Land Department in that respect had acquired the force of law, and could be changed only by express regulation to the contrary, and such regulation could not be made retroactive (Miner *vs.* Marriott, 2 Land Decisions, 711; *Ex parte* Thompson, 8 *id.*, 109), even had the Secretary of the Interior power, which he did not have, to make regulations under said act of June 4, 1897; and that the defendant under the practice of the Land Department had no power or authority to apply a different rule *for the first time* to the said selections of said Clarke.

18. And the petitioner avers that the sufficiency of the affi-
13 davits accompanying the said declarations of selections by said Clarke, was not questioned by the local land officers, and the said alleged omission even had it been material, was waived by the local land officers in the exercise of their original jurisdiction under the act of January 27, 1898, aforesaid, by the acceptance of the said deeds of relinquishment and affidavits filed therewith, and *entry* of said selections upon the records and tract books of said local land office at Visalia, California.

That the protests aforesaid in nowise questioned the sufficiency in substance and form of the said selections made by said Clarke, nor was the point of the alleged insufficiency of said affidavits raised by the Commissioner of the General Land Office in his said decision of December 18, 1900, and the United States has in nowise notified the selector of any defect in the exchange, and there is no issue in the record charging a failure to comply with the law.

And the petitioner avers that under the settled rules of appellate procedure in force in the Land Department as well as in the courts, the said point of alleged insufficiency of the said affidavits could not

be raised for the first time by the defendant in his appellate capacity to enforce an alleged regulation which, in the matter before him and in all other cases under said act of June 4, 1897, had been waived and ignored by the local land officers and the Land Department. (United States *vs.* Morant, 123 U. S., 335, 343.)

19. And the petitioner avers that the said affidavits, though not essential to the validity of the contract of exchange tendered by Congress and accepted and completed by the relinquishments and selections aforesaid, did, in law and in fact, allege the non-occupancy of the land as understood in the law and the practice of the Land Department, as they expressly negative all the elements of *legal occupancy*.

20. And the petitioner avers that under the rules of the Land Department the said decision of the defendant was, on the 2nd day of May, 1901, promulgated by the Commissioner of the General Land Office, and thereafter, to wit, on the 25th day of May, 1901, within the time allowed by said rules, the petitioner caused to be duly filed in the Land Department a motion for review of the said decision of April 25, 1901, alleging, that defendant erred, among other things, in holding that the mere recital in the form aforesaid constituted a regulation creating a condition precedent to the vesting of the said selector's title; in holding that such alleged regulation was binding upon said selector; in holding that the affidavits filed by said selector were insufficient; in holding that the said selector's title had not vested at the time of selection; in holding that subsequently discovered value of the land for mining purposes prevented the consummation of the contract of exchange between the Government and the selector; and in attempting to reject the said selections; a true copy of which motion is filed herewith, marked Exhibit V. And thereupon, under the rules of practice of said Land Department, said motion operated as a supersedeas of said defendant's said decision and action.

21. And the petitioner, protesting that the requirement of a non-occupancy or other affidavit was not in anywise essential to the validity of the contract of exchange effected by the said Clarke's selections aforesaid, and that the defendant was estopped from raising the point and deciding the case on said alleged insufficiency of said affidavits, and insisting that the said affidavits did in fact aver non-occupancy of the said land as understood by the law and practice of the Land Department, avers that the requirement by the Land Department of an accompanying affidavit as aforesaid, could be only matter of administrative policy, for even the general grant of authority to make regulations (section 2478 R. S., which is not applicable to the special act of June 4, 1887,)

"Is not a grant of power to legislate; to add to the law; to render its enforcement difficult; to burden the proceedings under it with unnecessary expense or hardship; or to encumber them with onerous and technical conditions. It is designed that the permitted regulations shall simplify and explain, not embarrass, the administration of the law; and certainly they must not only be appropriate,

but they must be reasonable, and within the limitations and intent of the statute." (Anchor *vs.* Howe, 50 Fed. Rep., 366.)

and any insufficiency in such affidavit would be merely a defect of form or procedure, which, under the rulings and practice of the Land Department and courts, if not waived by a failure of the local land officers to require it, which the petitioner avers resulted as aforesaid, could be cured at any time before final action, and the petitioner, for the full protection of its rights in the premises and to remove the aforesaid technical, specious, unreasonable, unwarranted and unlawful objection raised by the defendant, procured and caused to be filed in the Land Department on the 5th day of June,
14 1901, two certain supplemental affidavits alleging specifically that the said selected lands were unoccupied at the date of the said selections by said Clarke, true copies of which said affidavits are filed herewith, marked respectively, Exhibits W and X; and the petitioner avers that said affidavits were and are true in fact, and said alleged defect, if any, upon which the defendant based his decision aforesaid was thereupon and thereby cured.

22. That thereafter the defendant granted a hearing on said motion for review and ordered oral argument thereof before the Assistant Attorney General of the United States for the Department of the Interior, on the 8th day of October, 1901, and on the said day the matter came on for argument and hearing before the said Assistant Attorney General, who arbitrarily refused to hear any argument upon the question of the authority of the Secretary of the Interior to prescribe a non-mineral and non-occupancy affidavit, and required the argument to proceed upon the assumption that the Secretary of the Interior had by proper and lawful regulation prescribed such affidavit as a condition of selection under said act of June 4, 1897.

23. That thereafter, to wit, on the 12th day of April, 1902, the defendant rendered a decision adhering to the erroneous, unwarranted, and arbitrary ruling aforesaid, ignoring the curative effect of the supplemental affidavits, denying the said motion for review, and returning the papers to the Commissioner of the General Land Office, a true copy of which said decision is filed herewith, marked Exhibit Y.

Your petitioner alleges that the honorable Secretary of the Interior illegally and arbitrarily held and decided in said decision on review and on the application of petitioner to review said primary decision that the words "vacant land" in said act of June 4, 1897, meant land on which no one was shown by affidavit to be present, whether claiming title thereto or not, at the time of selection; and erroneously held and decided that the land selected was not "vacant land," though in truth and in fact vacant and unoccupied, if such vacancy and lack of occupancy was not shown by an affidavit of selector made and filed at the time and as a part of said selection; and erroneously held and decided that to be vacant land in the meaning of the act of June 4, 1897, the selected land must be not only free from the presence of any one on the land as a matter of fact, but must be shown to be free from such presence of any one on

the land at the date of selection, by an affidavit of selector made and filed by selector as a part of the record of selection, and that, notwithstanding the selected land at the time of the selection was in fact unoccupied, nevertheless the selection was void, so the decision arbitrarily holds, unless the said selection was when made then and there shown to be on unoccupied land by an affidavit of selector as a part of the record of selection.

Your petitioner alleges that there was no person present on the selected land at the time of selection. Your petitioner also alleges that no claim adverse to selector existed to such land at the date of selection; that the decision on review rests solely on the erroneous assumption of the honorable Secretary of the Interior that the words "vacant land" in the act of June 4, 1897, means land free from the presence thereon actual or constructive of any one whether claiming said selected land or not and that though unoccupied still the selected land was not vacant land under said act of June 4, 1897, unless and until shown by affidavit of selector to be unoccupied.

Your petitioner alleges that the said decision on review turns solely on a question of law and not on any question of fact or on any question of mixed law and fact; that the only question of law involved is the meaning of the act of June 4, 1897, and the particular words therein "vacant land open to settlement;" that your petitioner has done and performed all the acts required of him to be done by said act and by said words of said act; that the selected land was in fact and in law, vacant land open to settlement when selected and was so held to be by the receiver and register of the land office having jurisdiction so to decide at the time and when selected; that the honorable Secretary of the Interior erroneously held in his decision on review that the statute of June 4, 1897, only permitted land to be selected thereunder which had upon it at the time of selection no person and that the word "vacant" in said statute had reference to the physical condition of the land when selected and not to any claim upon or right to the land itself; and the petitioner avers that no adverse interest to that of selector exists or appears in the record of exchange of the lands herein described; that the United States makes no claim to the selected land and protestant has no interest therein; that on the record in this case petitioner is entitled to a patent for the selected land without cost therefor.

Your petitioner further alleges that all of the objections to the said selections set forth in the said protests were on appeal considered, weighed and decided against and held for naught by the defendant, and the judgment and findings of the Commissioner of the General Land Office and the order for a hearing on said protests were by the defendant reversed, overruled and vacated and judgment thereon on appeal rendered against said protests and protestants and in favor of the selector, but the defendant arbitrarily refuses to pass the said selections to patent and has arbitrarily ordered the case of the said selections dismissed from his docket, solely because of the alleged absence from the record of selection of a non-occupancy affidavit and not because of any ground or cause of objection to the

selections set up in said protests; that no review of the finding and judgment of the defendant on appeal vacating said judgment of the said Commissioner could have been or has been asked for or had by the said protestants or any of them, or by any one, but all parties have acquiesced in the vacating on appeal of said Commissioner's decision and judgment; that no contest in the case of the said selections was ever begun and the said Commissioner's decision and action in the case having been in all respects vacated and held for naught on appeal, there remains in the record of said selections in the Land Department no issue or question as to the validity of said selections or the title of the said selector and his grantees to the said lands selected as aforesaid and their right to receive patent or patents for the said lands.

15 And your petitioner avers that by said decision denying the said motion for review and adhering to his previous action aforesaid, the said defendant rejects said selections and applications for patents on the sole ground that the said affidavits accepted by the said local land officers as aforesaid, did not contain the following language, to wit:

"That there is no occupation of said land adverse to the selection thereof under the act of June 4, 1897," and. "That no portion of said land is claimed for mining purposes under the local customs and rules of miners or otherwise."

And the petitioner avers that inasmuch as the said selector Clarke by the selections aforesaid, and payment therefor by conveyance and relinquishment of the said patented forest reserve lands as aforesaid, secured a vested interest in the said selected lands, and a right to a patent therefor to which vested interest it has succeeded as aforesaid, and

"can no more be deprived of it by order of the Commissioner [or Secretary of the Interior] than he can be deprived by such order of any other lawfully acquired property. Any attempted deprivation in that way of such interest *will be corrected whenever the matter is presented so that the judiciary can act upon it.*" (Cornelius *vs.* Kessel, 128 U. S., 456, 461; Brown *vs.* Hitchcock, 173 U. S., 473, 478.)

And the petitioner avers that the said action of the defendant is an abuse of his power of supervision, for, such

"power of supervision and correction is not an unlimited or an arbitrary power. It can be exerted only when the entry was made upon false testimony or without authority of law," (Cornelius *vs.* Kessel, *supra;* Brown *vs.* Hitchcock, *supra*),

but nevertheless such action of the defendant in denying the said motion for review is final, and the petitioner has exhausted its remedy in the Land Department.

23*a*. And your petitioner further alleges that upon making the relinquishment aforesaid and the selections aforesaid in lieu thereof and the making of the certificates by the said register and receiver as aforesaid that the said selected lands were eligible to selection, it

became and was then and there the duty of the Commissioner of the General Land Office and the defendant to order a patent or patents for the said selected lands to be issued to the said selector Clarke and it is still their duty so to do.

And your petitioner further avers that in consequence of his arbitrary and unwarranted action in the premises as aforesaid, the defendant has never exercised any judgment or discretion in the premises and refuses to obey the law and discharge his duty and to order patent or patents to issue for the aforesaid lands to the said selector Clarke.

24. That after said selections by the said Clarke as aforesaid, to wit, on or about February 1, 1900, the said protestants by themselves or their privies, grantees, and employees, wrongfully and unlawfully, and without the knowledge or consent of the said Clarke or his grantees, for the first time entered into possession of the said selected lands, and have ever since held, and do now wrongfully hold, possession thereof, and exclude the said Clarke and his grantees, the said Alexander and the petitioner, therefrom by intimidation and threats of violence.

25. That neither the said protestants nor any person or persons other than the said selector Clarke have up to the present time filed in the Land Department any mineral or other claim to said selected lands, and no person or persons other than the petitioner are now seeking title thereto from the United States; that though the title of the petitioner to the said selected lands, as grantees through mesne conveyances from the said Clarke, is vested and indefeasible, and cannot be affected in law or equity by the said arbitrary and unlawful attempted rejection and cancellation of the said selections by the said defendant, yet the said action of the defendant attempting to reject the said selections, and denying patents thereunder, leaves remaining in the Gand Department no case or proceeding involving the title to the said selected lands, and the petitioner is left remediless in the Land Department; that by the said decision and action of the said defendant, the title to the said selected lands, so far as the Land Department is concerned, still remains in the United States, and your petitioner cannot further proceed against the United States to secure patents for said selected land either by action in the Land Department or in the courts.

And the petitioner is remediless in the premises by any known proceeding in any court of law or equity, or in the Land Department, to enforce its rights, except by this application for mandamus, and unless the writ of mandamus be issued by this honorable court, directed to the said defendant, your petitioner will be deprived of the possession and enjoyment of the said selected lands, and that the said selected lands are now worth more than ten thousand (10,000) dollars.

26. And the petitioner avers that the action of said defendant complained of is a matter of public concern and one occurring in the administration of justice.

Wherefore, the petitioner prays that this honorable court will, by

its writ of mandamus, command the said defendant, the said Ethan A. Hitchcock, Secretary of the Interior, as aforesaid, to forthwith recall and vacate his said order rejecting said selections of said Clarke, and if said selections have already been canceled, to vacate and recall said cancellation, and reinstate the proceedings relating to the said selections, and thereupon to proceed therein as re-
16 quired by law, and to order said selections passed to patent, and cause to be prepared and presented for signature to and by the proper officer of the United States of America, a patent or patents for the said selected lands, and that the petitioner may have such other or further relief as the premises warrant and to the court may seem meet.

RIVERSIDE OIL COMPANY,
By JOHN R. JOHNSTON, *President.*

JEFFERSON CHANDLER,
Att'y for Petitioner.
HORACE F. CLARK,
W. C. PRENTISS,
Of Counsel.

DISTRICT OF COLUMBIA, *ss:*

I, John R. Johnston, do solemnly swear that I am the president of The Riverside Oil Company, the petitioner named in the foregoing petition, and as such president have signed the same in the name of said company, and have authority so to do; further that I have read the said petition and know the contents thereof and that the matters therein stated of my own knowledge are true and those stated on information and belief I believe to be true.

Subscribed and sworn to before me this 16th day of April, A. D. 1902.

ALBANUS S. T. JOHNSON,
[SEAL.] *Notary Public.*

17 EXHIBIT "E."

Filed April 16, 1902.

Act June 4, 1897 (30 Stat., 36).

Selection in Lieu of Land in the Cascade Range Forest Reserve, Lakeview Land District, State of Oregon; created Feb. 14th, 1893.

45343.

To the register and receiver, United States land office, Visalia, California.

GENTLEMEN: In accordance with the provisions of an act of Congress approved June 4, 1897, entitled "An act making appropria-

tions for sundry civil expenses of the Government for the fiscal year ending June 30, 1898, and for other purposes,"

I, C. W. Clarke of San Francisco city and county, State of California, do hereby select and locate the following-described tract of surveyed land, to wit:

The north half of the southeast quarter of section four (4) in township twenty-nine (29) south, range twenty-eight (28) east of Mount Diablo meridian, containing eighty (80) acres.

In lieu of

The east half of the southwest quarter of section sixteen (16) in township twenty-one (21) south, range seven (7) east of Willamette meridian, containing eighty (80) acres.

18 The said last-mentioned tract is included within the limits of the Cascade Range forest reservation in Oregon, and being the owner, and desiring to select other land in lieu of said tract, I made and executed a deed of reconveyance thereof to the United States, on the 5th day of May, 1899, as provided by the said act of June 4, 1897, which said deed has been recorded in the proper county. I therefore ask that a United States patent issue to me for the land hereby selected.

Witness my hand this 13th day of December, 1899.

C. W. CLARKE.

Post-office address c/o F. A. Hyde, 415 Montgomery St., San Francisco, Cal.

[On the margin:] Part in California posted M'ch 3, 1900 E. V. J.

LAND OFFICE AT VISALIA, CALIF., *December* 14, 1899.

I, Geo. W. Stewart, register of the land office, do hereby certify that the land above selected, in lieu of land relinquished to the United States, is free from conflict, and that there is no adverse filing, entry or claim thereto.

GEO. W. STEWART, *Register.*

Selection approved by the Commissioner of the General Land Office, per letter "P" to register and receiver —— — 189– —— Div. "P."

19 Application to select endorsed on back as follows:

This application is accompanied by the affidavit of A. Barion of San Francisco, Cal., as to the non-mineral character of the land herein selected.

An abstract of title (duly certified by the recorder of Crook county, Oregon), to the land designated as basis for the within application, together with original deed from C. W. Clarke and Philomen Clarke (his wife) to the United States of America, dated May 5th, 1899, recorded May 11th, 1899, in vol. 7 of deeds, records of Crook county, Oregon, — will be found on file with the application of C. W. Clarke to select, under the provisions of the act of June 4th, 1897, all of sections 10, 14, 22, 26, 28 and 34, T. 15 N., R. 6. W., Olympia land district, Washington.

20 EXHIBIT "F."

Filed April 16, 1902.

Act June 4, 1897 (30 Stat., 36).

Selection in Lieu of Land in the Cascade Range Forest Reserve, — Land District, State of Oregon; Created Feb. 28th, 1893.

45343.

To the register and receiver, United States land office, Visalia, California.

GENTLEMEN: In accordance with the provisions of an act of Congress approved June 4, 1897, entitled "An act making appropriations for sundry civil expenses of the Government for the fiscal year ending June 30, 1898, and for other purposes."

I, C. W. Clarke of San Francisco city and county, State of California, do hereby select and locate the following-described tract of surveyed land, to wit:

The south half of the northeast quarter of section four (4) in township twenty-nine (29) south, range twenty-eight (28) east of Mount Diablo meridian, containing eighty (80) acres.

In lieu of

The southwest quarter of the southwest quarter of section sixteen (16) in township twenty-one (21) south, range seven (7) east; and the southwest quarter of the southwest quarter of section
21 thirty-six (36) in township thirty-seven (37) south, range five (5) east of Willamette meridian, containing eighty (80) acres.

The said last-mentioned tract is included within the limits of the Cascade Range forest reservation in Oregon, and being the owner, and desiring to select other land in lieu of said tract, I made and executed deeds of reconveyance thereof to the United States, on May 5th, 1899, and Oct. 28, 1898, respectively 1899, — as provided by the said act of June 4, 1897, which said deed has been recorded in the proper county and State. I therefore ask that a United States patent issue to me for the land hereby selected.

Witness my hand this 13th day of December, 1899.

C. W. CLARKE.

Post-office address c/o F. A. Hyde, 415 Montgomery St., San Francisco, Calif.

LAND OFFICE AT VISALIA, CALIF., *December* 14, 1899.

I, Geo. W. Stewart, register of the land office, do hereby certify that the land above selected, in lieu of land herein relinquished to the United States, is free from conflict, and that there is no adverse filing, entry or claim thereto.

GEO. W. STEWART, *Register.*

Selection approved by the Commissioner of the General Land Office, per letter "P" to register and receiver ——— — 189–. ——— Div. "P."

22 Application endorsed in typewriting on the back as follows:

This application is accompanied by the affidavit of A. Barion of San Francisco, Cal., as to the non-mineral character of the land herein selected.

The original deed from C. W. Clarke and wife to the United States of America, dated May 5th, 1899, recorded May 11th, 1899, in vol. 7 of deeds page 33, records of Crook county, Or., together with abstract of title to S. W. ¼ of S. W. ¼ of sec. 16, T. 21 S., R. 6 E. W. M., (a portion of the land used as basis for the within application) will be found on file with the application of C. W. Clarke to select, under the provisions of the act of June 4th, 1897, the N. E. ¼ of sec. 30, T. 15 W., R. 22 W., Missoula land district, Montana.

Original deed from C. W. Clarke and wife, to the United States of America, dated Oct. 28th, 1898, recorded Oct. 31st, 1898, in vol. 11 of deeds, page 296, records of Klamath county, Oregon, together with abstract of title to S. W. ¼ of S. W. ¼ of sec. 36, T. 37, S., R. 5 E. W. M., will be found on file in the office of the Commissioner of the General Land Office.

23 EXHIBIT G.

Filed April 16, 1902.

(Act June 4, 1897.)

Affidavit of Non-mineral Character and Non-occupancy.

45343.

U. S. LAND OFFICE, VISALIA, CALIFORNIA.

A. Barion, being duly sworn according to law, deposes and says: That he is over the age of 21 years, a citizen of the United States and of the State of California, and a surveyor by occupation and is well acquainted with the character of the following-described land and with each and every legal subdivision, thereof, to wit:

The south half of the northeast quarter of section four (4) in township twenty-nine (29) south, range twenty-eight (28) east, of Mount Diablo meridian, containing eighty (80) acres.

* * * * * * *

That the tract applied for is agricultural in character and contains no known deposits of coal or other minerals, and is not subject to entry under the coal or mineral land laws of the United States.

This affidavit is made upon the evidence found on the surface of the ground, deponent does not undertake to express any opinion as to what may be under the ground.

That he has frequently passed over the same and his personal

knowledge of said land is such as to enable him to testify
24 understandingly in regard thereto; that there is not to his knowledge within the limits thereof, any vein or lode of quartz or other rock in place, bearing gold, silver, cinnabar, lead, tin or copper, or any deposit of coal; that there is not within the limits of said land, to his knowledge, any placer, cement, gravel or other valuable mineral deposit; * * * that no portion of said land is worked for mineral during any part of the year by any person or persons; that said land is essentially non-mineral land and that the application therefor is not made for the purpose of fraudulently obtaining title to mineral land, but with the object of securing said land for agricultural purposes, so far as deponent knows and that the above and foregoing statements as to the character of said land apply to each and every legal subdivision thereof and that his post-office address is 420 California St., San Francisco, Calif.

A. BARION.

I hereby certify that the foregoing affidavit was read to affiant before he signed his name thereto; that said affiant is to me personally known (or has been satisfactorily identified before me by —— ——) and that I verily believe him to be a credible person and the person he represents himself to be, and that this affidavit was subscribed and sworn to before me at my office in San Francisco, California on this 13th day of December 1899.

HENRY P. TRICOU,

[SEAL.] *Notary Public in and for the City and County of San Francisco, State of California.*

25 EXHIBIT H.

Filed April 16, 1902.

(Act June 4, 1897.)

Affidavit of Non-mineral Character and Non-occupancy.

45343.

U. S. LAND OFFICE, VISALIA, CALIFORNIA.

A. Barion, being duly sworn according to law deposes and says: That he is over the age of 21 years, a citizen of the United States and of the State of California, and a surveyor by occupation and is well acquainted with the character of the following-described land and with each and every legal subdivision thereof, to wit:

The north half of the southeast quarter of section four (4) in township twenty-nine (29) south, range twenty-eight (28) east of Mount Diablo meridian, containing (80) acres.

* * * * * * *

That the tract applied for is agricultural in character and contains no known deposits of coal, or other minerals, and is not subject to entry under the coal or mineral land laws of the United States.

This affidavit is made upon the evidence found on the surface of the ground. Deponent does not undertake to express any opinion as to what may be under the ground.

That he has frequently passed over the same and his personal knowledge of said land is such as to enable him to testify understandingly in regard thereto; that there is not to his knowledge
26 within the limits thereof, any vein or lode of quartz or other rock in place, bearing gold, silver, cinnabar, lead, tin, or copper, or any deposit of coal; that there is not within the limits of said land, to his knowledge, any placer, cement, gravel, or other valuable mineral deposit; * * * that no portion of said land is worked for mineral during any part of the year by any person or persons; that said land is essentially non-mineral land and that the application therefor is not made for the purpose of fraudulently obtaining title to mineral land, but with the object of securing said land for agricultural purposes (so far as deponent knows), and that the above and foregoing statements as to the character of said land apply to each and every legal subdivision thereof, and that his post-office address is 420 California St., San Francisco, California.

A. BARION.

I hereby certify that the foregoing affidavit was read to affiant before he signed his name thereto, that said affiant is to me personally known (or has been satisfactorily identified before me by —— ——) and that I verily believe him to be a credible person and the person he represents himself to be, and that this affidavit was subscribed and sworn to before me at my office in San Francisco, California, on the 13th day of December, 1899.

[SEAL.] HENRY P. TRICOU,
Notary Public in and for the City and County of San Francisco, State of California.

27 EXHIBIT I.

Filed April 16, 1902.

45343.

UNITED STATES LAND OFFICE,
VISALIA, CALIFORNIA, *January* 21, 1900.

Honorable Commissioner General Land Office, Washington, D. C.

SIR: I transmit herewith the application of C. W. Clarke to select under the act of June 4, 1897, the S. ½ of N. E. ¼ sec. 4, T. 29 S., R. 28 E. M. D. M.

I also transmit herewith * * * the affidavit of A. Barrion as to the character of the land selected.

In re deed of C. W. Clarke and wife to United States of tract surrendered and abstract of title thereto, see note on back of enclosed application.

The records of this office show the land selected to be free from conflict and subject to such selection.

Publication herein is ordered under circular of December 18, 1899.

Very respectfully, GEO. W. STEWART, *Register.*

28 EXHIBIT J.

Filed April 16, 1902.

45343.

UNITED STATES LAND OFFICE,
VISALIA, CALIFORNIA, *January* 22, 1900.

Honorable Commissioner General Land Office, Washington, D. C.

SIR: I transmit herewith the application of C. W. Clarke to select under the act of June 4, 1897, the N. ½ of S. E. ¼ sec. 4, T. 29 S., R. 28 E., M. D. M.

I also transmit herewith * * * the affidavit of A. Barrion as to the character of the land selected.

In re deed from C. W. Clarke and wife to the United States of tract surrendered and abstract of title thereto, see note on back of enclosed application.

The records of this office show the land selected to be free from conflict and subject to such selection.

Publication is ordered under circular of December 18, 1899.

Very respectfully, GEO. M. STEWART, *Register.*

29 EXHIBIT K.

Filed April 16, 1902.

DEPARTMENT OF THE INTERIOR,
UNITED STATES LAND OFFICE, VISALIA, CALIFORNIA.

In the Matter of the Application of C. W. CLARK, to Select the S. ½ of N. E. ¼ of Sec. 4, T. 29 S., R. 28 E., M. D. B. — M. and the N. ½ of S. E. ¼ of Sec. 4, T. 29 S., R 28 E., M. D. B. & M., under the Provisions of an Act of Congress Approved June 4, 1897.

45343.

To the register and receiver, United States land office, Visalia, California.

GENTLEMEN:—The undersigned, the Kern Oil Company, a corporation, duly organized and existing under and by virtue of the

laws of the State of California, respectfully protests against the application of said C. W. Clarke, to select the lands mentioned as S. ½ of the N. E. ¼ of sec. 4 and N. ½ of the S. E. ¼ of sec. 4, all in T. 29 S. R. 28, E., M. D. B. — M., under the provisions of an act of Congress, approved June 4th, 1897, and for cause of protest, shows as follows:

That on or about the 11th day of June, 1899, J. F. Elwood, H. M. Rodgers, Frank R. Lindsay, D. S. Snodgrass, V. I. Willis, F. M. Garrison, F. K. Wiseman and Geo. L. Hoxie, then being citizens of the United States, and over the age of twenty-one years, as an asso-
30 ciation of eight persons, made location of certain consolidated placer mining claims, under the laws of the United States, and which placer mining claims were known as the "Fossil" placer mining claim, being the N. E. ¼ of sec. 4 and the "June Bug" placer mining claim, being the N. ½ of the S. E. of ¼ said section 4, all in T. 29 S. R. 28 E., M. D. B. & M. At the time of making said locations, the locators thereof distinctly marked the boundaries of said placer mining claim, and each of them so that the lines could be readily traced, and built initial monuments and corner monuments, and set intermediate stakes between said corner monuments, so that any person going upon the ground could readily trace the lines, and posted notices of location on the claims, and each of them which notices contained a description of the claim, and the names of the locators, and the date of location, and which notice was recorded in the office of the county recorder of the county of Kern, a certified copy of which is hereto attached, and made a part hereof.

That at the time of making said locations, the locators thereof had made such discovery of mineral as to entitle them to make the said location, and thereupon, said locators entered into possession of said mining claims, and each of them, and worked and developed the same, and sunk wells upon said mining claims and each of them, and in sinking said wells discovered petroleum in paying quantities, upon each of said claims; which wells were respectively; on the June Bug placer to a depth of 122 feet; and on the Fossell placer to a depth of 130, and were prospect wells, sunk for the purpose of fully prospecting the said claims.

That immediately adjoining this land, and within 75 feet from the west line thereof, an oil well was sunk by the owner of the premises upon which the same was bored, and in sinking
31 said well, the oil sands and strata cont-ing the petroleum, was found at about the depth of one hundred and twenty feet.

That said oil sands continues to a depth at the present time of three hundred and eighty feet, and that the product of said well and the yield thereof, is at least twenty-five to thirty barrels of petroleum per day.

That on the north of said "Fossil" placer mining claim, and within fifty feet of the north boundary thereof, a well was sunk by the West Shore Oil Company, a corporation, and that the said company found oil sands at a depth of about one hundred feet, in its

live state, and a producer of petroleum, and at a depth of four hundred and fifty feet, said oil well will and is calculated to produce petroleum of at least twenty barrels per day. That the strata of oil sands underlying the placer mining claims hereinbefore set forth, are flat and horizontal and *is* what is known to miners as a blanket formation.

That the protestant herein is grantee of said lands by mean conveyance of said locator, and that this affiant has paid large sums of money for said placer mining claims, which purchase was made solely for the petroleum therein contained, and for no other purpose.

That said lands are now worth two hundred and fifty dollars per acre, for the petroleum therein contained, and have no value whatsoever, other than a nominal value for agricultural or grazing purposes, for the reason that said lands are not susceptible of irrigation, being above any possible ditch level that might be brought from the Kern river, which is the only means of irrigating or obtaining water to irrigate said lands.

32 That in conformation, the lands are precipitous and steep, deep ravines and gulches running through the same, and even if water could be brought upon the land, the same could not be retained for practical irrigation purposes. That said lands are sandy, desert lands, no vegetation growing thereon.

That this protestant has been in possession of said mining claims, and each of them, viz: That west half of each of them, and each of said locations, and is now, and has been for a long time past *been* the owner thereof. That this protestant has expended considerable money in developing the said claims and the premises so owned by them, for the petroleum therein contained, and to show the actual worth of the lands as petroleum land, and the same lies in one of the greatest petroleum belts in the State of California.

That the lands so selected by the said C. W. Clarke, and each of said applications, embraces lands now owned and possessed by this protestant, and that the said C. W. Clarke, at the time of making his said application, well knew the mineral character of the lands, and could have known the same if he had gone upon the premises. That the oil-bearing formation underlying these premises is flat and horizontal, and what is known to miners as a blanket formation.

That the said C. W. Clarke well knew the mineral character of said lands, but notwithstanding such fact, selected the same as agricultural lands, and caused one A. Barrion to make an affidavit setting forth certain facts, and striking out of said affidavit many material facts required by the Department of the Interior, to be made in selecting said lands. That at the time said A. Barrion, made said affidavit, (and the said Clarke selected said lands, upon

33 said affidavit), said Barrion stated that no mining operations were being carried on upon said lands, or any part thereof, and that in truth and in fact, on the east half of said Fossil placer mining claim, and on the south half of the northeast quarter of said

section four, there were derricks, machinery, tools, buildings, and appliances upon said placer mining claims, of the value of at least five thousand dollars, all of which matters and things said Barrion well knew, if he went upon the land, as said machinery and buildings were upon the highest point upon said lands.

This protestant represents to the honorable Commissioner of the General Land Office, that said C. W. Clarke, did not and could not have taken up said land for agricultural purposes and caused said affidavit to be made, except for the purpose of obtaining or endeavoring to obtain said mineral lands in violation of the rights given to settler under the act of June 4th, 1897.

That said lands have no value as agricultural lands, all of which matters and things said C. W. Clarke well knew, and that the application of said C. W. Clarke was made, as this protestant sets forth and believes, for the purpose of obtaining the mineral locations and mining claims owned by this protestant and in violation of the laws of the United States prohibiting the selection of mineral lands under the act of June 4th, 1897, all of which matters and things said C. W. Clarke must have known, if he went upon the premises or caused any person to go upon the premises as set forth in the affidavit on file in the Land Office.

34 And this protestant hereto attaches affidavits of J. M. Keith, Geo. L. Hoxie, W. E. Knowles, O. B. Phelps, Frank R. Lindsay, J. F. Elwood, showing the character of said lands and the value thereof for petroleum purposes, and makes such affidavits a part of this protest, and represents to the department that the persons making such affidavits are credible persons, to whom full faith and credit should be given in their statements as set forth in their said affidavits.

Your petitioner and protestant respectfully asks that the honorable Commissioner of the General Land Office consider the matters and facts set forth in this protest, together with the affidavits hereto attached, and that an order be made directing a hearing before the register and receiver of the United States land office at Visalia, California, which hearing shall be for the purpose of determining the character of the lands embraced within said S. ½ of N. E. ¼ and N. ½ of S. E. ¼ of said sec. 4, T. 29, S. R. 28, E., M. D. B. — M., and whether or not they are worth more for agricultural purposes than for the minerals therein contained.

And further, that this protestant may show to the honorable Commissioner of the General Land Office, that the application of C. W. Clarke is not making the said application in good faith but for speculative purposes, and for the purpose of perpetrating a fraud upon the Government of the United States.

All the matters and things set forth in this protest, this protestant avers and sets forth to be true.

And that your protestant will ever pray.

Dated this 3rd day of February, 1900.

KERN OIL COMPANY, *Corporation*,

[SEAL.] By JOHN M. KEITH, *President*,

H. P. BENDER, *Secretary*.

35 STATE OF CALIFORNIA, } ss:
County of Kern, }

H. P. Bender, being duly sworn, deposes and says: That he is the same H. P. Bender who signed the foregoing protest, and that he has read the same and knows the contents thereof, and that all of the matters and things therein set forth are true so far as it concerns any acts of said corporation, and so far as any matters or things set forth concerning other persons, this affiant believes it to be true.

H. P. BENDER.

Subscribed and sworn to before me, this 3rd day of February, 1900.

[SEAL.] M. R. CRAIG,
Notary Public in and for the County of Kern, State of California.

C. LINKENBACH,
Attorney for Protestant, Bakersfield, Cal.

36 *Notice of Location, Placer Claim.*

Notice is hereby given, that the undersigned, in compliance with the requirements of the Revised Statutes of the United States, have this day located the following-described placer mining grounds, viz:

Commencing at the northeast corner of section four (4) in tp. 29 S. R. 28 E., of Mt. D. M., thence west forty (40) chains to the ¼-section corner on the north line of said section. Thence south forty (40) chains to the center of said section. Thence east forty (40) chains to the quarter-section corner on the east line of said section. Thence north forty (40) chains to the point of commencement. Being the northeast quarter of said section, and containing one hundred and sixty acres.

This location is made by us as an association of eight persons in conformity with the laws of the United States, and the State of California, and for the purposes of claiming an developing oil, natural gas, and other and valuable minerals and water for mining and domestic uses.

This notice of location is posted about 400 ft. northeasterly from the southwest corner of said claim, situate in the county of Kern, State of California. This claim shall be known as the Fossil placer mining claim.

Located the 11th day of June 1899.

J. F. ELWOOD.
H. M. RODGERS.
FRANK R. LINDSAY.
D. S. SNODGRASS.
V. I. WILLIS.
F. M. GARRISON.
F. K. WISEMAN.
GEO. L. HOXIE.

37 Witnesses to posting of notice:

V. I. WILLIS.
D. S. SNODGRASS.
GEO. L. HOXIE.
FRANK LINDSAY.
H. M. RODGERS.
F. M. GARRISON.
J. F. ELWOOD.
F. K. WISEMAN.

I certify the foregoing to be a true copy of the original filed for record at the request of Wells, Fargo & Co. July 5th, 1899, at 10.15 a. m.

CHAS. A. LEE, *Recorder.*

STATE OF CALIFORNIA, } ss:
County of Kern, }

I hereby certify the above and foregoing to be a full, true and correct copy of the notice of location of Fossil placer m'n'g claim by J. F. Elwood, *et als.* on the 5th day of July, 1899, as the same appears of record in Book 15 of Min. Rec. at page 442 *et seq.*, Kern county record.

Witness my hand and official seal, this 1st day of Feb'y, 1900.

(I. R. stamp, 10.)

CHAS. A. LEE,
County Recorder of said Kern County,
[SEAL.] By C. S. MERONY, *Dep-ty.*

38 *Notice of Location, Placer Claim.*

Notice is hereby given, that the undersigned in compliance with the requirements of the Revised Statutes of the United States, have this day located the following-described placer mining ground, viz:

Commencing at the quarter-section corner on the east line of section four (4) in tp. 29 S. R. 28 E., of Mt. D. M. Thence west forty (40) chains to the center of said section. Thence south twenty chains to the southwest corner of the N. ½ of S. E. ¼ of said section. Thence east forty (40) chains to the S. E. corner of the N. ½ of S. E. ¼ of said section. Thence north twenty (20) chains to the point of commencement. Being the N. ½ of S. E. ¼ of said section four (4) and containing 80 acres.

This location is made by us as an association of eight persons in conformity with the laws of the United States and the State of California, and for the purposes of claiming and developing oil, natural gas, and other valuable minerals, and water for mining and domestic uses.

This notice of location is posted about 400 ft. southeasterly from the northwest corner of said claim, situate in the county of Kern, State of California.

This claim shall be known as the "June Bug" placer mining claim.

Located the 11th day of June, 1899.

J. F. ELWOOD.
H. M. RODGERS.
FRANK R. LINDSAY.
D. S. SNODGRASS.
F. M. GARRISON.
V. I. WILLIS.
F. K. WISEMAN.
GEO. L. HOXIE.

39 Witnesses to posting of notice:

V. I. WILLIS.	FRANK LINDSAY.
D. S. SNODGRASS.	F. M. GARRISON.
GEO. L. HOXIE.	J. F. ELWOOD.
H. M. RODGERS.	F. K. WISEMAN.

I certify the foregoing to be a true copy of the original filed for record at the request of Wells, Fargo & Co. July 5th, 1899, at 10.15 a. m.

CHAS. A. LEE, *Recorder.*

(*Certificate of County Recorder of Kern County, Dated Jan.* 26, 1900.)

STATE OF CALIFORNIA, } ss:
County of Kern, }

I hereby certify the above and foregoing to be a full, true and correct copy of the notice of location by J. F. Elwood *et als.*, of the June Bug placer mine on the 11th day of June, 1899, as the same appears of record in Book 15 of M'n'g Rec. at page 437 *et seq.* Kern county record.

Witness my hand and official seal, this 26th day of Jan. 1900.
(I. R. stamp 10.)

CHAS. A. LEE,
County Recorder of said Kern County,
[SEAL.] By C. S. MERONY, *Deputy.*

40 DEPARTMENT OF THE INTERIOR,
UNITED STATES LAND OFFICE, VISALIA, CALIFORNIA.

In the Matter of the Application of C. W. CLARKE to Select the S. ½ of N. E. ¼ of Sec. 4, T. 29 S., R. 28 E., M. D. B. M., and the N. ½ of S. E. ¼ of Sec. 4, T. 29 S., R. 28 E., M. D. B. M., under the Provisions of an Act of Congress Approved June 4th, 1897.

STATE OF CALIFORNIA, } ss:
County of Kern, }

J. M. Keith, being duly sworn, deposes and says: That he is a citizen of the United States, over the age of twenty-one years, and a resident of the county of Kern, State of California. That he is manager for The Kern Oil Company, the "33" Oil Company and the Im-

perial Oil Company and other companies, working and operating petroleum mines and wells in what is known as the Kern River oil district, in the county of Kern, State of California, and in township 28, S. R. 28 E., M. D. B. M., and T. 29 S. R. 28 E., M. D. B. M.

That he attaches to this affidavit and makes it a part of the affidavit, a plat showing the exact locations of petroleum wells, that have been bored in the said townships, under his direct supervision and direction. With reference to said plat, there is noted "well 19," being on the S. W. ¼ of sec. 32, T. 28 S. R. 28 E., M. D. B. M., and that said well was bored under his direction and supervision, to a depth of six hundred and ninety-eight feet, and that the actual live petroleum strata and sands penetrated in this well are of a thickness of two hundred and thirty feet, and the same continues so far as this affiant can learn at the present time. That said
41 well will produce from twenty-five to thirty barrels per day. That "well 18" noted on said plat or map hereto attached and made a part of this affidavit, being on the N. W. ¼ of sec. 4, T. 29, S. R. 28 E. M. D. B. M., was bored under the supervision of this affiant, and is of about the same depth and same formation and the same production as "well 19," there being only a few hundred feet distance between said wells. That wells Nos. 10, 11, 12 and 13 noted on said plat and being in the S. E. ¼ of sec. 33, T. 28 S. R. 28 E., M. D. B. M., were all bored or drilled under the supervision of this affiant; and that said wells, will range in depth from five hundred and twenty feet to five hundred and fifty feet none being less than five hundred and twenty feet, and the oil sand so far penetrated in each of these wells is of a depth of from eighty to ninety feet, and at the present depth, the said wells will produce not less than twenty barrels of petroleum per each twenty-four hours, and some of them will produce petroleum at a much greater rate per day, and it may be safely said that each of said wells may be relied upon to produce at least twenty barrels of petroleum per each twenty-four hours. That he is well acquainted with the placer mining claims, situated in the county of Kern, knows as the "Fossil" placer mining claim, being the N. E. ¼ of sec. 4, T. 29, S. R. 28 E., and the "June Bug" placer mining claim, being the N. ½ of the S. E. ¼ of said sec. 4, T. 29, S. R. 28 E., M. D. B. M., and that the wells heretofore mentioned as having been drilled and bored under his supervision, are high upon the hills and above the level of said "Fossil" placer mining claim, and the "June Bug" placer mining claim, and taking it as a level from said wells, that, the oil strata and sands being flat or horizontal in formation, would be penetrated at a depth of
42 about 200 to 220 feet in said "June Bug" placer mining claim, and said "Fossil" placer mining claim.

JOHN M. KEITH.

Subscribed and sworn to before me, this 2nd day of February, 1900.

C. LINKENBACH,

[SEAL.] *Notary Public in and for Kern Co., Cal.*

(Map T. 28, S. R. 28 E., M. D. M.)

5—1264A

43 DEPARTMENT OF THE INTERIOR,
UNITED STATES LAND OFFICE, VISALIA, CALIFORNIA.

In the Matter of the Application of C. W. CLARKE to Select the S. ½ of N. E. ¼ of Sec. 4, T. 29 S., R. 28 E., M. D. B. M., and the N. ½ of S. E. ¼ of Sec. 4, T. 29 S., R. 28 E., M. D. B. M., under the Provisions of an Act of Congress Approved June 4th, 1897.

STATE OF CALIFORNIA, } ss:
County of Fresno, }

Geo. L. Hoxie, being duly sworn, deposes and says: That he is a citizen of the United States over the age of twenty-one years, and a resident of the county of Fresno, State of California. That he is civil engineer by profession and occupation, and has been for seven years last past, county surveyor of the county of Fresno. That he is one of the locators of certain consolidated placer mining claims, situated in the county of Kern, State of California, to wit: "June Bug" placer mining claim, being the N. ½ of S. E. ¼ of sec. 4, T. 29, S. R. 28 E., and the "Fossil" placer mining claim, being the N. E. ¼ of said sec. 4, T. 29, S. R. 28 E., M. D. B. M.

That at the time of making said locations, and each of them, the locators thereof, under the direction and supervision and assistance of this affiant, marked the boundary lines of each of said locations, so that the same could be readily traced upon the ground, and placed corner stakes at each corner of said claims, and inter-
44 mediate stakes, and built initial monuments upon each of said claims, and posted a notice of location thereon, describing the boundary lines of said claims, and the names of the locators, and the names of the claim and the date of location, that a true and correct copy of said notice so posted was recorded in the office of the county recorder of the county of Kern, State of California, that at the time of making said locations, and each of them, the locators thereof had made a discovery of mineral and petroleum within said boundary lines, of said locations, and which discovery was such as did lead them to continue and sink wells upon said locations, and each of them, and that the said locators did sink a well on said "June Bug" placer mining claim, during the month of June, and early part of July, 1899, to a depth of one hundred and twenty-two feet, and in sinking said well, found petroleum and penetrated the oil sand and strata containing bituminous matters and petroleum, and that the same was more than of extraordinary richness. That said well was bored and sunk at the expense of said locators, and that the said locators and their successors in interest have been in possession of said placer mining claims, and each of them from said date of location to the present time.

GEO. L. HOXIE.

Subscribed and sworn to before me this 3rd day of February, 1900.
[SEAL.] M. R. CRAIG,
Notary Public in and for Fresno Co., Cala.

45 DEPARTMENT OF THE INTERIOR,
UNITED STATES LAND OFFICE, VISALIA, CALIFORNIA.

In the Matter of the Application of C. W. CLARKE to Select the S. ½ of N. E. ¼ of Sec. —, T. 29 S., R. 28 E., M. D. B. M., and the N. ½ of S. E. ¼ of Sec. 4, T. 29 S., R. 28 E., M. D. B. M., under the Provisions of an Act of Congress Approved June 4th, 1897.

STATE OF CALIFORNIA, } ss:
County of Fresno, }

Geo. L. Hoxie, being duly sworn, deposes and says: That he is a citizen of the United States over the age of twenty-one years, and a resident of the county of Fresno, State of California. That he is a civil engineer by profession, and now holds the position of county surveyor of the county of Fresno, State of California.

That he made the annexed plat and map from surveys made by him of the premises therein referred to, and the said plat or map is a true and correct and accurate plat of the lands shown and described therein, and the said plat accurately shows the wells on said lands.

GEO. L. HOXIE.

Subscribed and sworn to before me, this 3rd day of February, 1900.

[SEAL.] M. R. CRAIG,
Notary Public in and for the County of Fresno, State of California.

46 DEPARTMENT OF THE INTERIOR,
UNITED STATES LAND OFFICE, VISALIA, CALIFORNIA.

In the Matter of the Application of C. W. CLARKE to Select the S. ½ of the N. E. ¼ of Sec. 4, T. 29 S., R. 28 E., M. D. B. M., and the N. ½ of S. E. ¼ of Sec. 4, T. 29 S., R. 28 E., M. D. B. M., under the Provisions of an Act of Congress Approved June 4th, 1897.

STATE OF CALIFORNIA, } ss:
County of Kern. }

Judson F. Elwood, being duly sworn, deposes and says: That he is a citizen of the United States, over the age of twenty-one years, and a resident of the State of California. That he is one of the locators of the "June Bug" placer mining claim, being the N. ½ of the S. E. ¼ of sec. 4, T. 29 S. R. 28 E., M. D. B. M., and the "Fossil" placer mining claim, being the N. E. ¼ of said sec. 4 T. 29 S. R. 28 E., M. D. B. M. That he, as one of the locators of said "June Bug" placer mining claim, caused a well to be bored upon said placer mining claim, beginning in the latter part of June, 1899, and completed during the month of July of said year. That in boring said well, petroleum in large quantities was found and penetrated

at a depth of one hundred and twenty-two feet, and showed the lands to be of more than extraordinary value for petroleum mining. That this affiant and his grantees, to the knowledge of this affiant, have remained in possession of said placer mining claims, and each of them, working and developing the same, since the date of location, on the 11th day of June, 1899. That this affiant
47 has examined the surface indications of said "Fossil" placer mining claim carefully to ascertain the indications and the petroleum therein contained. That the same foundation exists and underlies the said "Fossil" placer mining claim, and underlies the said "June Bug" placer mining claim, and oil is obtained in the said "Fossil" placer mining claim, at about the same depth.

J. F. ELWOOD.

Subscribed and sworn to before me, this 1st day of February, 1900.

[SEAL.] M. R. CRAIG,
Notary Public in and for Kern Co., Cala.

48 DEPARTMENT OF THE INTERIOR,
UNITED STATES LAND OFFICE, VISALIA, CALIFORNIA.

In the Matter of the Application of C. W. CLARKE to Select the S. ½ of N. E. ¼ of Sec. 4, T. 29 S., R. 28 E., M. D. B. M., and the N. ½ of S. E ¼ of Sec. 4, T. 29 S., R. 28 E., M. D. B. M., under the Provisions of an Act of Congress Approved June 4th, 1897.

STATE OF CALIFORNIA, } ss:
County of Kern, }

Frank R. Lindsay, being first duly sworn, deposes and says: That he is a citizen of the United States, over the age of twenty-one years, and a resident of the State of California. That he is one of the locators of certain placer mining claims, made on the 11th day of June, 1899, to wit: "Fossil" placer mining claim being the N. E. ¼ of sec. 4 T. 29 S. R. 28 E., M. D. B. M. and "June Bug" placer mining claim, being the N. ½ of the S. E. ¼ of said sec. 4 T. 29 S. R. 28 E., M. D. B. M.

That at the time of making the said locations, and each of them, said lands were unoccupied and unappropriated public lands belonging to the Government of the United States.

That the boundary lines of each of said claims were so marked by the locators thereof, at the time of making said locations, that they could be readily traced upon the ground by any person going upon the premises. That some time during the month of June and early part of July, 1899, the locators of said "June Bug"
49 placer mining claim, caused a well to be sunk upon said claim at or near the center thereof, to a depth of one hundred and twenty-two feet, and that petroleum in paying quantities was found at a depth of one hundred feet, and that at the time said well was capped, petroleum in such quantities was found as to assure the

great value of said "June Bug" placer mining claim, for petroleum purposes. That during the month of July 1899, the locators of said "Fossil" placer mining claim, caused a well to be drilled or bored upon said placer mining claim, which work was done under the direct supervision of this affiant. That in drilling said well, oil and oil sands were first penetrated at a depth of about one hundred feet, and the said well was continued to a depth of one hundred and thirty feet, and at said depth of 130 feet, petroleum in such quantities was found as to assure the great value of said claim, for petroleum, mining, and would produce at least from three to four barrels of petroleum per day.

That by reason of the close proximity of said placer mining claims to the railroad, a well upon said claims that would produce from two to two and a half barrels per day would be a paying well.

That this affiant being one of the locators of the association *was* located the said consolidated placer mining claims as aforesaid, went into possession of the same until conveyance by them of the Elwood Oil Company, and this affiant as manager of the said Elwood Oil Company, remained in possession of the same until the conveyance by said Elwood Oil Company, to the part now owned by this protestant, and that thereupon, this protestant entered into possession of that part of said claim, which is described in the protest, to which reference is hereby made, and that the said Kern
50 Oil Company, has been in possession and has been the owner of said placer mining claims from that date to the present time.

That the oil-bearing strata and sand underlying each of these claims is flat and horizontal and as such is known to petroleum miners as a blanket formation, containing petroleum.

FRANK R. LINDSAY.

Subscribed and sworn to before me, this 2nd day of February, 1900.

[SEAL.] M. R. CRAIG,
Notary Public in and for Kern Co., Cala.

DEPARTMENT OF THE INTERIOR,
UNITED STATES LAND OFFICE, VISALIA, CALIFORNIA.

In the Matter of the Application of C. W. CLARKE to Select the S. ½ of the N. E. ¼ of Sec. 4, T. 29 S., R. 28 E., M. D. B. M., and the N. ½ of S. E. ¼ of Sec. 4, T. 29 S., R. 28 E., M. D. B. M., under the Provisions of an Act of Congress Approved June 4th, 1897.

STATE OF CALIFORNIA, } ss:
County of Kern, }

O. B. Phelps, being duly sworn, deposes and says: That he is a citizen of the United States, over the age of twenty-one years, and a resident of the State of California. That he has been engaged
51 in examining lands in petroleum fields for the past twenty years, and also engaged in petroleum mining.

That he is well acquainted with certain placer mining claims, situated in the county of Kern, State of California, and known as the "June Bug" placer mining claim, being the N. ½ of S. E. ¼ of sec. 4 T. 29 S. R. 28 E., M. D. B. M.; also the "Fossil" placer mining claim, being the N. E. ¼ of said sec. 4 T. 29 S. R. 28 E., M. D. B. M. and knows the exterior boundaries of said claims, and each of them, of his own knowledge. That he has examined the surface ground, within the boundary lines of said claims, and each of them, and that on said examination he found sand and shale, containing bituminous matters and the residuum of petroleum in such quantities as would lead any petroleum miner to make further developements of the claims, and ascertain the production of petroleum therein contained.

That on or about the first of June, 1899, he went upon said "June Bug" placer mining claim, and there found a well being put down on said claim, at or near the center thereof, and that he made examination of the debris of sand and oil as being taken out of said well, in the work of sinking the same, and that the oil and sand that was being taken from the well showed that oil was found in considerable quantities.

That during the month of July, 1899, this affiant also went upon the "Fossil" placer mining claim, being the N. E. ¼ of said sec. 4,
and there found persons engaged in the operation of drilling
52 for oil on said placer mining claim; that in the operation of
drilling said well, shale and sand was being taken from said well, and the oil showed to be in considerable quantities, and was sufficient to show that the same was a paying well, and that the strata of oil sand was of extraordinary moisture, and of great value for petroleum mining.

That during the year 1899, under the supervision of this affiant, a well was sunk upon the northwest quarter of said sec. 4, in said township and range, a distance of about one hundred feet, from the west boundary line of said "Fossil" placer mining claim; that in sinking said well, at a depth of one hundred and twenty feet, oil and oil strata and oil-bearing sands were found, and oil was found to be in large quantities at that depth; and on further development of said well on said N. W. ¼ the product of the well would exceed twenty-five barrels of petroleum per day. That the oil strata and sand in which petroleum was found in said N. W. ¼ of said sec. 4 and near the line of said "Fossil" placer mining claim, is flat or horizontal and is what is termed by miners a blanket vein, and that the same being of a depth of near three hundred feet, could not otherwise than extend into and underlie the said "Fossil" placer mining claim, and the said "June Bug" placer mining claim, by reason of the close proximity of the same, and that the same strata was encountered by this affiant and the same oil found by this affiant, as was found by the persons engaged in drilling the oil well on said N. E. ¼ of said sec. 4 and N. ½ of the S. E. ¼ of said sec. 4. That from his experience in petroleum mining and in sinking and boring wells, and knowing the actual production of oil from the sands penetrated

in sinking the same, the said well upon the said "June Bug" placer mining claim, and the said "Fossil" placer mining claim, are
53 sufficient for him to say that the same are of more than extraordinary richness, and that the wells embraced within these lands, are of more than extraordinary richness for petroleum mining, and oil in great quantities underlying the same.

O. B. PHELPS.

Subscribed and sworn to before me, this 1st day of February, 1900.
[SEAL.] M. R. CRAIG,
Notary Public in and for Kern Co., Cala.

DEPARTMENT OF THE INTERIOR,
UNITED STATES LAND OFFICE, VISALIA, CALIFORNIA.

In the Matter of the Application of C. W. CLARKE to Select the S. ½ of N. E. ¼ of Sec. 4, T. 29 S., R. 28 E., M. D. B. M.. and the N. ½ of the S. E. ¼ of Sec. 4, T. 29 S., R. 28 E., M. D. B. M., under the Provisions of an Act of Congress Approved June 4th, 1897.

STATE OF CALIFORNIA, } *ss:*
County of Kern, }

W. E. Knowles, being first duly sworn, deposes and says: That he is a citizen of the United States, over the age of twenty-one years, and a resident of the State of California. That he is manager of the West Shore Oil Company, a corporation owning and developing the S. E. ¼ of sec. 32 T. 28 S. R. 28 E., M. D. B. M. Kern county, California.

That he is well acquainted with the "Fossil" placer min-
54 ing claim, being the N. E. ¼ of sec. 4, T. 29 S. R. 28 E., M. D. B. M., and that he as manager of said West Shore Oil Company, caused an oil well to be sunk on the S. E. ¼ of said sec. 32, about seventy-five feet from the north line of said "Fossil" placer mining claim, to a depth of about four hundred and fifty feet. That the oil well so sunk by him on said S. E. ¼ of said sec. 32 will produce not less than twenty-five barrels of petroleum per day. That the same shale and sand containing bituminous matters and the residuum of petroleum is found upon the said "Fossil" placer mining claim, as found upon the said S. E. ¼ of said sec. 32, and that the oil *stratas* and sands penetrated in boring said well is about two hundred feet in thickness. And at a depth of four hundred and fifty feet, the same continues to grow richer as further depth is attained, and that this affiant does not know the full depth of said oil strata at the present time.

That the same is horizontal in formation, and is what is termed by petroleum miners as a blanket strata of oil sands containing petroleum. That the near proximity of said well to the said "Fossil" placer mining claim, shows beyond a doubt that the same strata extends into the said "Fossil" placer mining claim, and underlies the same; the formation being flat, no other fact or theory could be

educed from the same other than the same strata of oil-bearing sand underlies said "Fossil" placer mining claim.

W. E. KNOWLES.

Subscribed and sworn to before me, this 1st day of February, 1900.
[SEAL.] M. R. CRAIG,
Notary Public in and for Kern Co., Cala.

(Endorsed:) # 127–128. U. S. land office. Visalia, Cal. Kern Oil Company *vs.* C. W. Clarke. Filed February 6, 1900. Geo. W. Stewart, register. C. Linkenbach, attorney for protestant, Bakersfield, Cal.

55 EXHIBIT L.

Filed April 16, 1902.

IN THE UNITED STATES LAND OFFICE
AT VISALIA, CALIFORNIA.

In the Matter of the Application of C. W. CLARKE to Enter the N. ½ of the S. E. ¼ of Sec. 4, T. 29 S., R. 28 E., M. D. M., under Act of June 4, 1897. Filed December 14th, 1899. 45343.

Come now, J. F. Elwood, H. M. Rodgers, Frank R. Lindsay, D. S. Snodgrass, F. M. Garrison, V. I. Willis, F. K. Wiseman, Geo. L. Hoxie, the Elwood Oil Company (a corporation) and the Bakersfield and Fresno Oil Company (a corporation), and file this their protest to the application of C. W. Clarke to enter the north half of the southeast quarter of section 4, township 29 south, range 28 east, Mount Diablo base and meridian, under the act of June 4th, 1897, and for grounds of contest and protest allege:

That long prior to the said application of said Clarke to wit, prior to December 14th, 1899, to select said land under said act above referred to, all of said land above described had been selected, located, occupied and possessed as a mineral claim, and was so owned and possessed at the time said application to select the same was made, and in that behalf protestants more particularly aver that heretofore, to wit, on or about the 11th day of June, 1899, the said lands above described were open, unoccupied lands of the Government of the United States, of mineral character and subject to location as mineral lands and mining claims under the laws of the United States, and on said day J. F. Elwood, H. M. Rodgers,
56 Frank R. Lindsay, D. S. Snodgrass, F. M. Garrison, V. I. Willis, F. K. Wiseman, and Geo. L. Hoxie, each of said persons being then and there a citizen of the United States, over the age of twenty-one years and in all respects competent to locate and claim mining property, did on and prior to said date discover mineral thereon, to wit, petroleum oil, in paying quantities, and did discover thereon a large and permanent strata of oil sand in place, containing and producing petroleum oil of great value, and the same was

of sufficient value, and the discovery of mineral on said lands was amply sufficient to warrant said locators or any other person or persons in the location of said claim, and in prosecuting the work of mining and developing the same for the production of petroleum oil, and having so discovered said claim and said land being open and unoccupied land of the United States and subject to location, as a placer mining claim, the said persons above named did locate the said land above described and did post in a conspicuous place on said land, to wit, at or near the points of discovery of said claim, a notice of the location of said land as a placer mining claim, to be occupied and developed as such mining claim in one group, and said notice so posted thereon did set forth that the name of said claim was the June Bug placer mining claim; that the names of the locators thereof were the persons above named, whose names were set forth in said notice; the date of the discovery thereof to wit: June 11th, 1899, and the description of the same as the north half of the southeast quarter of section 4, township 29 south, range 28 east, Mount Diablo base and meridian; that within thirty days from the date of said discovery, and on, to wit, July 5th, 1899, a similar notice of location was recorded in the office of the county recorder of Kern county, California, the county within which
57 said land was situated, and at the time of making said location, to wit, on June 11th, 1899, the location thereof duly marked the boundaries of said claim so that the lines of each of them could be readily traced on the ground, and built monuments of earth and rock at each corner of said claim and a strong and permanent stake was driven into the ground at each of said corners and into such oils of rock and earth, and such stakes were marked by letter and figures showing what corner of the claim the same was placed to represent and indicate, and placed intermediate monuments and stakes between said corner stakes so that the lines and boundaries of said claim were distinctly marked and any person going upon the ground could easily and readily trace the line of said claim, and said notice so posted as aforesaid contained the names of the witnesses to such posting, and within sixty days from the date of the discovery of said claim, the locators thereof performed labor thereon in developing the same, which said labor was equivalent to and largely exceeded ten dollars' worth of labor for each twenty acres, or fractional part thereof, contained in said claim, and said work consisted particularly in the erection of machinery and boring a vertical hole three and a half inches in diameter to a depth of 122 feet on said land, clearing a roadway necessary for the purpose of transporting tools and machinery on said ground for the purpose of developing same; and ever since the location of said claim, and on and including the date of the application therefor by said applicant the locators of said claim, their grantees and successors in interest, have remained in the open, quiet, peaceable and uninterrupted possession of said claim, and all and every part thereof, and are now developing, mining and improving the same, and are in possession thereof

with derricks erected thereon, drilling tools and other appli-
58 ances, for boring for oil, and are, and have been, actually engaged in boring upon said land, and developing the same for the production of mineral, to wit, petroleum oil, and after said location, and long prior to the application for said land by said Clarke, the said locators in the mining and developement of said mining claim sunk thereon an oil well which penetrated the oil sand to a depth of about thirty feet; that said oil sand was in place bearing and producing oil in large and paying quantities; and the oil flowed into said well and filled the same to a considerable depth, and exuded therefrom and flowed with the sands from said well, and demonstrated the existence of oil-producing sands and oil upon said claim in extraordinary and large and paying quantities, and the said well has a productive capacity of twenty to twenty-five barrels of oil per day and will produce a net profit of from fifteen to twenty dollars per day for the oil produced therefrom; that the oil sand penetrated lies practically horizontal under said land, and other wells can be sunk upon said land to the same or greater depth, and such other wells will produce like or greater quantities of oil, and with the single well now sunk thereon and on account of the oil produced therefrom, without the boring or further wells or further developements on said land the same is much more valuable for the production of mineral oil than for any agricultural or grazing purpose, and said land is worth, for the production of petroleum oil at present $250.00 cash per acre, and is utterly worthless for grazing or agricultural purposes, and the said land will produce, and is now producing oil, in large and paying quantities and is much more valuable for the oil now produced therefrom than for grazing or agricultural purposes.

That many other wells have been bored and completed, and many others are now in process of completion, in the vicinity
59 of said land, all of which demonstrate that the oil penetrated on the land in controversy is of the same strata and of the same value as that on such adjacent land, and a map showing such wells, the land in question, and the adjoining land, is hereto attached, marked Exhibit "A" and hereby referred to and made a part of this protest.

That after said Clarke filed his application to select said land, he conveyed the same, and all his interest therein, to one D. E. Alexander, and thereafter the said Alexander brought an action in the circuit court of the United States, ninth circuit, southern district of California, against one Charles A. Canfield, and others interested in said land, including these protestants, which said action was numbered 935 in the records of said court, and the same was brought to restrain the mineral claimants of said land from mining and developing the same, and in said action and upon a preliminary motion to have an injunction issue from said court restraining said defendants from further mining on said land, when the said matter came on for hearing the court appointed certain commissioners to bore an oil well upon said land near the well above referred to, for the pur-

pose of ascertaining if petroleum oil existed on said land. That said well was bored to a depth of 122 feet, and the same penetrated the oil sand to a considerable depth and petroleum oil flowed into said well in such quanitities as to demonstrate the great value of the said land for mineral purposes and thereupon said plaintiff appeared before the court in said action, and on or about the 5th day of February, 1900, dismissed his said action and abandoned all contest on said land and has made no further claim thereto.

60 That said land is situated in a very dry region of country, and four years out of five there is not sufficient rain thereon, or in the vicinity thereof, to produce crops or vegetation of any kind or character sufficient for any agricultural purpose or for grazing; that in rainy or unusual years when there is rain said land produces but very scanty vegetation and in quantities wholly insufficient for grazing purposes and will not at any time produce agricultural crops of any value. That all of said land is exceedingly rough, steep, covered with shale and other formations indicating the existence of petroleum oil in large and paying quantities therein and rendering said land wholly unfit and unsuitable for agricultural or grazing purposes, and the same is so situated that water cannot be brought thereon, nor can the same be in any way irrigated, as there is no water available for irrigating the same, and if water could be brought thereon the said land is so rough, uneven and precipitous, and so intersected with gulches, ravines, ridges and hills, that the irrigation thereof would be entirely impossible. That said land for more than twenty-five years last past has remained open, unoccupied, unclaimed and unsought land of the Government of the United States, and but for the discovery of mineral oil thereon never would have been sought for any purpose, and the purpose of said applicant to select said land under said act is solely and only to obtain the same for its mineral value and in order to mine the same, and deprive and defraud these contestants of their said lands.

That on and ever since the 11th day of June, 1899, the locators of said land, and these contestants and their successors in interest therein, have been, and now are, the owners of said land and entitled to the possession thereof, subject only to the paramount

61 title of the United States, and the possession and occupation of said locators and their successors in interest therein have been well, commonly, generally and extensively known in the neighborhood of said land, and *was* well known, as these contestants are informed and believe and therefore aver, to the said applicant at the time he sought to apply for and select the same under said act. That said land is not agricultural and is not worth anything and could not be sold for any price for agricultural or grazing purposes, but is totally worthless for any purpose other than mining and the production of mineral oil thereon, and on the day said application was made therefor under said act the same was not, nor was any portion thereof, subject to entry under said act, but the same was owned, seized and possessed and was in the possession of and occupied by said mining locators and their successors in interest,

and was withdrawn from entry or selection under said act. That said locators, after locating and acquiring title to said land, as hereinbefore set forth, and while the owners *and* in possession thereof, did, under proper deeds of grant, transfer and convey said land, and all their right, title and interest therein to these contestants, and these contestants are now the owners of said land and in the quiet, open and undisputed possession thereof, and are developing the same for mining purposes and the production of mineral oil thereon.

Contestants aver that the Elwood Oil Company and the Bakersfield and Fresno Oil Company, are now, and each of them is, and for more than three months last past has been, a corporation duly incorporated and existing as such under the laws of the State of California.

Contestants file herewith corroborative affidavits of the mat-
62 ters and things stated herein, and make the same a part hereof, and aver that they are holding said land as a mining claim and in good faith as mineral land, and they intend as rapidly as possible to proceed with the further developement of said land and in the production of mineral therefrom and are now mining and drilling thereon for the purpose of producing oil therefrom.

Wherefore, contestants pray that further proceedings relating to said application be suspended until further developements and operation shall have further demonstrated the mineral character and productive capacity of the same for mineral purposes; that upon a hearing — determination thereof, it be adjudged that these contestants are and were long prior to the application to select said land under said act the owners of and in possession thereof, and that the same was withdrawn from entry under said act, and that all of said land is of greater value for mineral than for agricultural or grazing purposes, and is not agricultural or grazing land.

FRANK H. SHORT,
Attorney for Protestants.

STATE OF CALIFORNIA, }
County of Fresno, } ss:

D. S. Snodgrass, F. M. Garrison and Geo. L. Hoxie, being first duly sworn, says: each for himself and not one for the other I am one of the contestants named in the foregoing contest and am interested in the land in controversy. I have read the said protest and know the contents thereof and the same is true of my own
63 knowledge except as to the matters therein stated upon information or belief, and as to those matters I believe it to be true. I have been engaged in mining, prospecting and developing oil lands for more than one year last past, and have personally been over, inspected and carefully observed each and every legal subdivision of said lands applied for by said applicant, and I am competent to express an opinion as to the character thereof, both for mineral and agricultural purposes; that said land is as stated in the foregoing protest utterly worthless for agricultural purposes and

will not produce crops and has no value for grazing purposes, and the same is very valuable for mineral purposes.

D. S. SNODGRASS.
F. M. GARRISON.
GEO. L. HOXIE.

Subscribed and sworn to before me this 10th day of February, 1900.

F. E. COOK, [SEAL.]
Notary Public in and for said County of Fresno, State of California.

STATE OF CALIFORNIA, } ss:
County of Fresno, }

V. I. Willis, A. B. Elmore and W. M. McKenzie, being first duly sworn, says, each for himself and not one for the other—that
64 he is a resident and inhabitant of the State of California, and has been for more than one year last past. That he is a citizen of the United States, over the age of twenty-one years and competent to be a witness; that he has read the foregoing contest of J. F. Elwood *et al.*, and knows the contents of the same and hereby refers thereto and makes the same a part of this affidavit, and avers that the matters and things stated therein are true.

That he is now and for more than one year last past has been, engaged in prospecting, locating and developing oil lands for the production of petroleum oil; that he has been upon and over all the lands described in said protest, and has carefully inspected the same, and each and every legal subdivision thereof; that said lands are sandy, covered with gravel, shale, rock, and other substances and the indications thereon demonstrate that said land is of great value for the production of petroleum oil and is utterly unsuited, unfit and of no value for agricultural or grazing purposes. That the matters stated in said protest as to the location, developement and productiveness of said land for mining purposes are true, and said lands are of great value, to wit, the present value of the same for mining purposes is $250.00 per acre, and upwards, and the same is not worth anything and could not be sold for any price whatever for agricultural or grazing purposes, and to the knowledge of affiant said lands were located by said locators, occupied and possessed, and are now and were on the 14th day of December, 1899, and long prior thereto, located, occupied, possessed, and were and are being developed in the manner stated in said protest for mining purposes.

V. I. WILLIS.
A. B. ELMORE.
W. H. McKENZIE.

65 Subscribed and sworn to before me this 10th day of September, 1900.

F. E. COOK, [SEAL.]
Notary Public in and for said County of Fresno, State of California.

STATE OF CALIFORNIA, } ss:
County of Fresno, }

W. H. McKenzie, being first duly sworn, deposes and says: That he is a citizen of the United States, a resident of the county of Fresno, State of California, over the age of twenty-one years and competent to be a witness. That he has resided in said Fresno county for many years, and for about two years last past has been engaged in the business of locating, leasing and developing oil lands in Kern county, California, and elsewhere;

That affiant was present on or about July 1st, 1899, when the oil well was completed, or about completed, on the north half of southeast quarter of section 4, in township 29 south, range 28 east, Mount Diablo base and meridian, and was informed by the persons who had bored said well that the same was down to a depth of about 120 feet. That affiant saw and personally examined the materials taken from said well; that said well was about four inches in diameter, and a considerable portion of the material taken therefrom, as affiant could tell by an examination thereof, and as he well knew from his experience, was oil sands, and was oil-bearing sand carrying oil and impregnated therewith, and it was apparent from such examination that oil in considerable " and valuable quantities had been taken from said well and in connection with said sand when the same was being bored, and that from the materials taken from said well it was apparent that oil sand had been encountered and bored through to a considable depth, and oil had been produced from said well, and by further developements would be produced therefrom in much larger and paying quantities.

That affiant was personally interested in and in part superintended the boring of a well on the southeast quarter of the northwest quarter of said section 4; that at the depth of 125 feet oil sands bearing oil, and which would have produced oil in paying quantities, to the extent of several barrels of oil per day, were encountered and bored through; that said well was proceeded with and sunk to a further depth of about 350 feet in the aggragate, and at that depth further strata of oil sands bearing oil in large and paying quantities were encountered and bored into, and said well produced and flowed large quantities of oil, and as examined and estimated by affiant, and as he would judge from his experience and examination of other and similar oil wells, the said well would produce 40 barrels of oil per day, or thereabouts, and the same is a very valuable and profitable producing oil well, and the indications are from the depths of oil sand passed through and the appearance thereof, that said well will continue to produce oil in said quantity, or approximate such quantity of oil for a very long time.

That affiant is thoroughly familiar with the said land, and the surrounding land, and states that the same is barren and utterly worthless for agricultural or grazing purposes, and that the same is of great value for the oil mineral which can be produced therefrom.

W. H. McKENZIE.

Subscribed and sworn to before me this 10th day of
67 February, 1900.

[SEAL.] F. E. COOK,
Notary Public in and for said County of Fresno,
State of California.

Endorsed: "Entered #127 in the United States land office at Visalia, California. In the matter of the application of C. W. Clarke to enter the N. ½ of S. E. ¼ of sec. 4, T. 29 S. R., 28 E., M. D. M. under act of June 4, 1897. Filed Feb'y 12, 1900. O. Scribner receiver."

EXHIBIT M.

Filed April 16, 1902.

IN THE UNITED STATES LAND OFFICE
AT VISALIA, CALIFORNIA.

In the Matter of the Application of C. W. CLARKE to Enter the S. ½ of the N. E. ¼ of sec. 4, T. 29 S., R. 28 E., M. D. M., under act of June 4th, 1897. Filed December 14th, 1899. 45343.

Comes now J. F. Elwood, H. M. Rodgers, Frank R. Lindsey, D. S. Snodgrass, F. M. Garrison, V. I. Willis, F. K. Wiseman, Geo. L. Hoxie, the Elwood Oil Company, (a corporation) and the Bakersfield and Fresno Oil Company (a corporation) and file this their protest to the application of C. W. Clarke to enter the south half of the northeast quarter of section 4, township 29 south, range 28 east, Mount Diablo base and meridian, under the act of June 4th,
68 1897, and for grounds of protest and contest, allege:

That long prior to said application, to wit, prior to December 14th, 1899, to select said land under said act above referred to, all of said land above described, and all of the northeast quarter of said section has been selected, located, occupied and possessed as a mineral claim, and was so owned, and possessed at the time said application to select the same was made, and in that behalf, protestants more particularly aver; that heretofore, to wit, on or about the 11th day of June, 1899, all of the northeast quarter of said section was unoccupied land of the Government of the United States, of mineral character and subject to location as mineral land and mining claims under the laws of the United States, and on said day J. F. Elwood, H. M. Rodgers, Frank R. Lindsey, D. S. Snodgrass, F. M. Garrison, V. I. Willis, F. K. Wiseman and Geo. L. Hoxie, each of said persons, being then and there a citizen of the United States, over the age of twenty-one years, and in all respects competent to locate and claim mining property, did, on and prior to said date, discover mineral thereon, to wit, petroleum oil, in paying quantities, and did discover thereon a large and permanent strata of oil sand in place, containing and producing petroleum oil of great value, and the same was of sufficient value, and the discovery of mineral on

said land was amply sufficient to warrant said locators, or any other person or persons, in the location of said claim, and in prosecuting the work of mining and developing the same for the production of petroleum oil, and having so discovered said claim, and said land being open and unoccupied land of the United States and subject to location as a placer mining claim, the said persons above named did locate the said land above described, and post in a
69 conspicuous place on said land, to wit, at or near the point of discovery of said claim, a notice of the location of said land as a placer mining claim, to be occupied and developed as such mining claim in one group, and said notice so posted thereon did set forth that the name of said claim was the Fossil placer mining claim; that the names of the locators thereof were the persons above named, whose names were set forth in said notice, and said notice contained the names of the witnesses to such posting, and the date of the discovery thereof, to wit, June 11th, 1899; and the description of the same as all of the northeast quarter of section 4 as above described; that within thirty days of the date of said discovery, and on, to wit, July 5th, 1899, a similar notice of location, being a copy of said notice was recorded in the office of the county recorder of Kern county, California, the county within which said land was situated, and at the time of making said location, to wit, on June 11th, 1899, the locators thereof duly marked the boundaries of said claim so that the lines of each of them could be readily traced on the ground, and built monuments of earth and rock at each corner of said claim, and a strong and permanent stake was driven into the ground at each of said corners and into such pile of earth and rock, and such stakes were marked by letters and figures showing what corner of the claim the same was placed to represent and indicate, and said locators also placed intermediate mounds and stakes between said corner stakes so that the lines and boundaries of said claim were distinctly marked and any person going upon the ground could easily and readily trace the lines of said claim; and within sixty days from the date of the discovery thereof the said locators performed labor thereon in developing the same, which
70 said labor was equivalent to and largely exceeded ten dollars' worth of labor for each 20 acres, or fractional part thereof, contained in said claim, and said work consisted particularly in the erection of machinery and boring a vertical hole three and a half inches in diameter to a depth of 120 feet, clearing a roadway for the purpose of transporting tools and machinery on said ground for the purpose of developing the same; and ever since the location of said claim, and on and including the date of the application therefor by said applicant, the locators of said claim and their grantees and successors in interest have remained in the open, quiet, peaceable and uninterrupted possession of said claim, and all and every part thereof and are now developing, mining and improving the same, and are in possession thereof with derricks erected thereon, drilling tools and other appliances for boring for oil, and are and have been actually engaged in boring upon said land and in developing the

same for the production of mineral to wit, petroleum, and after said location, and long prior to the application for said land by said Clarke, the said locators in the mining and developement thereof sunk thereon an oil well which penetrated the oil sand to a depth of about 20 feet; that said oil sand was in place bearing and producing oil in large and paying quantities, and the oil flowed into said well and filled the same to a considerable depth and exuded therefrom and flowed with the oil sands from said well and demonstrated the existence of oil producing sands and oil upon said claim in extraordinary and large and paying quantities, and said well has a productive capacity of 20 or 25 barrels of oil per day and will produce a net profit of from fifteen to twenty dollars per day for the oil produced thereon; that the oil sand penetrated lies practically horizontal under said land, and other wells can
71 be sunk upon said land to the same or greater depth, and such other wells will produce like or greater quantities of oil, and with the single well now sunk thereon and on account of the oil produced therefrom, without boring of further wells or further developements on said lands, the same is much more valuable for the production of mineral oil than for any agricultural or grazing purpose, and said land is worth for the production of petroleum oil at present $250.00 cash per acre, and is utterly worthless for grazing or agricultural purposes, and said land will produce, and is now producing oil in large and paying quantities and is much more valuable for oil now produced therefrom than for grazing or agricultural purposes.

That many other wells have been bored and completed, and many others are now in process of completion and will soon be completed, and in the vicinity of said land all of which demonstrates that the oil sand penetrated on the land in controversy is of the same strata and of the same value as that on such adjacent land, and a map showing such wells, the land in question and adjoining land, is hereto attached marked Exhibit "A" and hereby referred to and made a part of this protest.

That after said Clarke filed his application to select said land he conveyed the same, and all of his interest therein, to one D. E. Alexander, and thereafter the said Alexander brought an action in the circuit court of the United States, ninth circuit, southern district of California, against one Chas. A. Canfield, and others interested in said land, including these protestants, which said action was numbered 935 in the records of said court, and the same was brought to restrain the mineral claimants of said land from mining and developing the same, and in said action and upon a preliminary
72 motion to have an injunction issue from said court restraining said defendants from further mining on said land, when the said motion came on for hearing, the court appointed certain commissioners to bore an oil well upon said land near the well above referred to for the purpose of ascertaining if petroleum oil existed on said land. That said well was bored to a depth of 122 feet, and the same penetrated the oil sand to a considerable depth, and petro-

leum depth, and petroleum oil flowed into such well in such quantities as to demonstrate the great value of said land for mineral purposes, and thereupon said plaintiff appeared before said court in said action, and on or about the 5th day of February, 1900, on his own motion dismissed said action and abandoned all contests on said land and has made no further claim thereto and said mineral claimants are now proceeding with the developement of said land.

That all of said land is situated in a very dry region of country, and four years out of five there is not sufficient rain thereon, or in the vicinity thereof, to produce crops, or vegetation of any kind or character sufficient for any agricultural purpose, or for grazing, that in rainy, or unusual years when there is rain, said land produces but very scanty vegetation and in quantities wholly insufficient for grazing purpose and will not at any time produce agricultural crops of any value. That all of said land is exceedingly rough, steep, covered with shale, and other formations indicating the existence of petroleum oil in large and paying quantities therein, and rendering said land wholly unfit and unsuitable for agricultural or grazing purposes, and the same is so situated that water cannot be brought thereon, nor can the same be in any way irrigated, as there is no water
73 available for irrigating the same, and if water could be brought thereon the said land is so rough, uneven and precipitious, and so intersected with gulches, ravines, ridges and hills that the irrigation thereof would be entirely impossible. That said land for more than twenty-five years last past has remained open, unoccupied, unclaimed and unsought land of the Government of the United States, and but for the discovery of mineral oil thereon never would have been sought for any purpose, and the purpose of said applicant in selecting said land under said act is solely and only to obtain the same for its mineral value and in order to mine the same and deprive and defraud these contestants of their said lands.

That on and ever since the 11th day of June 1899, the locators of said land, and these contestants and their successors in interest therein, have been, and now are, the owners of said land and entitled to the possession thereof, subject only to the paramount title of the United States, and the possession and occupation of said locators, and their successors in interest therein has been well, commonly, generally, and extensively known in the neighborhood of said land and was well known, as these contestants are informed and believe, and therefore aver, to the said applicant at the time he sought to apply for and select the same under said act.

That said land is not agricultural and is not worth anything and could not be sold for any price for agricultural or grazing purposes, but is totally worthless for any purpose other than mining and the production of mineral oil thereon, and on the day said application was made therefor under said act, the same was not, nor was
74 any portion thereof, subject to entry under said act, but the same was owned, seized and possessed and was in the pos-

session of and occupied by said mining locators and their successors in interest, and was withdrawn from entry or selection under said act. That said locators, after locating and acquiring title to said land, as hereinbefore set forth, and while the owners and in the possession thereof, did under proper deeds of grant, transfer and convey said land, and all their right, title and interest therein to these contestants, and these contestants are now the owners of said land and in the quiet, open and undisputed possession thereof, and are developing the same for mining purposes and the production of mineral oil thereon.

Contestants aver that the Elwood Oil Company and the Bakersfield and Fresno Oil Company, are now, and each of them is and for more than three months last past has been, a corporation duly incorporated and existing as such under the laws of the State of California.

Contestants file herewith corroborative affidavits of the matters and things stated herein, and make the same a part hereof, and aver that they are holding said land as a mining claim and in good faith as mineral land, and they intend as rapidly as possible to proceed with the further developement of said land and in the production of mineral oil therefrom, and are now mining and drilling thereon for that purpose.

Wherefore, contestants pray that further proceedings relating to said application be suspended until further developements and operation shall have further demonstrated the mineral character and productive capacity of the same for mineral purposes; that upon a hearing and determination thereof, it be adjudged that these contestants are and were long prior to the application to select said land under said act the owners of and in possession thereof, and that the same was withdrawn from entry under said act, and that all of said land is of greater value for mineral than for agricultural or grazing purposes, and is not agricultural or grazing land.

75

FRANK H. SHORT,
Attorney for Protestant.

STATE OF CALIFORNIA, }
County of Fresno, } *ss:*

D. S. Snodgrass, F. M. Garrison, and Geo. L. Hoxie, being first duly sworn, says: each for himself and not one for the other, I am one of the contestants named in the foregoing contest and I am interested in the land in controversy. I have read the said contest and know the contents thereof and the same is true of my own knowledge except as to those matters therein stated upon information or belief, and as to these matters I believe it to be true. I have been engaged in mining, prospecting and developing oil lands for more than two years last past, and have personally been over, inspected and carefully observed each and every legal subdivision of said lands applied for by the said applicant, and I am competent to express an

opinion as to the character thereof, both for mineral and agricultural purposes that said land is as stated in the foregoing protest utterly worthless for agricultural purposes, and will not produce crops and has no value for grazing purposes, and the same is very valuable for mineral purposes.

D. S. SNODGRASS.
F. M. GARRISON.
GEO. L. HOXIE.

76 Subscribed and sworn to before me, this 10th day of February, 1900.

[SEAL.] F. E. COOK,
Notary Public in and for said County of Fresno, State of California.

STATE OF CALIFORNIA, } ss:
County of Fresno, }

V. I. Willis, A. B. Elmore, and W. H. McKenzie, being first duly sworn, says, each for himself and not one for the other, that he is a resident and inhabitant of the State of California, and has been for more than one years last past. That he is a citizen of the United States, over the age of twenty-one years and competent to be a witness; that he has read the foregoing contest of J. F. Elwood *et al.*, and knows the contents thereof and hereby refers thereto and makes the same a part of this affidavit, and avers that the matters and things stated therein are true. That he is now and for more than one year last past has been, engaged in prospecting, locating and developing oil lands for the production of petroleum oil; that he has been upon and over all the lands described in said protest, and has carefully inspected the same, and each and -very legal subdivision thereof; that said lands are sandy, covered with gravel, shale, rock and other substances, and the indications thereon demonstrate that said land is of great value for the production of petroleum oil and is utterly unsuited, unfit and of no value for agricultural or grazing purposes. That the matters stated in said protest as to the location, development and productiveness of said land for
77 mining purposes are true, and said lands are of great value, to wit, the present value of same for mining purposes, is $250.00 per acre, and upwards, and the same is not worth anything and could not be sold for any price whatever for agricultural or grazing purposes, and to the knowledge of affiant said lands were located by said locators, occupied and possessed, and are now and were on the 14th day of December, 1899, and long prior thereto, located, occupied, possessed and were and are being developed in the manner stated in said protest for mining purposes.

V. I. WILLIS.
A. B. ELMORE.
W. H. McKENZIE.

Subscribed and sworn to before me this 10th day of February, 1900.

[SEAL.] F. E. COOK,
Notary Public in and for the said County of Fresno, State of California.

UNITED STATES OF AMERICA.

STATE OF CALIFORNIA, } ss:
County of Fresno, }

G. W. Hensley, being first duly sworn, deposes and says: That he is a citizen of the United States, a resident of the county of Fresno, State of California, over the age of twenty-one years and competent to be a witness.

78 Affiant further says that he is a well-borer by occupation and that he has followed the business of boring wells for the last fifteen years. That on July 12th, 1899, he entered upon the northeast quarter of section 4, township 29 south, range 28 east, Mount Diablo base and meridian, situate in the county of Kern, State of California, and with his assistants did, on said quarter section and a short distance south and west of the center thereof, erect machinery and bore a well thereon for the purpose of developing mineral, to wit, petroleum oil, on said land, if any such mineral were thereon.

That affiant at said time bored a hydraulic well thereon about 4 inches in diameter and to a depth of 130 feet, and such well was completed on or about the 17th day of July, 1899. That in boring such well affiant penetrated oil sand in said land a distance of about 20 feet, and during all the time such well was being sunk through said oil sand petroleum oil in paying quantities, in the opinion of affiant, flowed out of said well with the water, and such oil was plainly discernible and was observed by affiant and those aiding him in said work, and the same continued to flow out of said well during all the time the oil sand was being penetrated, as aforesaid.

From the examination of said land and the boring of such well thereon, and observing the petroleum oil flowing from said well, as aforesaid, affiant states that said land above described is valuable for the minerals therein doposited, to wit, is valuable for petroleum oil, and that if a standard well were bored thereon petroleum oil in large and paying quantities and of great value would be developed thereon.

79 That affiant was employed by, and bored said well and did all of said work for, the Elwood Oil Company (a corporation) the successor in interest in said land of the mineral locators thereof said land having been heretofore located as a placer mining claim by certain citizens of the United States and the title thereto, after such location and before said well was bored by affiant, conveyed to the said corporation above named by such mineral locators thereof.

G. W. HENSLEY.

Subscribed and sworn to before me this 12th day of January, 1900.

[SEAL.] F. E. COOK,
Notary Public in and for said County of Fresno, State of California.

STATE OF CALIFORNIA, *County of Fresno,* } ss:

W. H. McKenzie, being first duly sworn, deposes and says; that he is a citizen of the United States, a resident of the county of Fresno, State of California, over the age of twenty-one years and competent to be a witness. That he has resided in said Fresno county for many years, and for about two years last past has been engaged in the business of locating, leasing and developing oil lands in Kern county, California, and elsewhere.

80 That affiant was present on or about July 1st, 1899, when the oil well was completed, or about completed, on the north half of the southeast quarter of section 4, in township 29 south, range 28 east, Mount Diablo base and meridian, and was informed by the persons who had bored said well that the same was down to a depth of about 120 feet. That affiant saw and personally examined the materials taken from said well; that said well was about four inches in diameter, and a considerable portion of the material taken therefrom, as affiant could tell by an examination thereof, and as he well knew from his experience, was oil sands, and was oil-bearing sand carrying oil and impregnated therewith, and it was apparent from such examination that oil in considerable and valuable quantities had been taken from said well and in connection with said sand when the same was being bored, and that from the materials taken from said well it was apparent that oil sand had been encountered and bored through to a considerable depth and oil had been produced from said well, and by further developments would be produced therefrom in much larger and paying quantities.

That affiant was personally interested in and in part superintended the boring of a well on the southeast quarter of the northwest quarter of said section 4; that at the depth of 125 feet oil sands bearing oil, and which would have produced oil in paying quantities, to the extent of several barrels of oil per day, were encountered and bored through; that said well was proceeded with and sunk to a further depth of about 350 feet in the aggregate, and at that depth further strata of oil sands bearing oil in large and paying quantities were encountered and bored into, and said well produced and

81 flowed large quantities of oil, and as examined and estimated by affiant, and as he would judge from his experience and examination of other and similar oil wells, the said well would produce 40 barrels of oil per day, or thereabouts, and the same is a very valuable and profitable producing oil well, and the indications are from the depths of oils and passed through and the appearance thereof, that said well will continue to produce oil in said quantity, or approximate such quantity of oil for a very long time.

That affiant is thoroughly familiar with the said lands, and the surrounding land, and states that the same is barren and utterly worthless for agricultural or grazing purposes, and that the same is of great value for the oil mineral which can be produced therefrom.

W. H. McKENZIE.

Subscribed and sworn to before me this 10th day of February, 1900.

[SEAL.] F. E. COOK,
Notary Public in and for said County of Fresno, State of California.

Endorsed: "Entered. #128. In the United States land office at Visalia, California. In the matter of the application of C. W. Clarke, to enter the S. ½ of the N. E. ¼ of section 4, T. 28 S., R. 28 E., M. D. B. M., under act of June 4th, 1897, filed December 14th, 1897. Filed, Feb'y 12, 1900. O. Scribner, receiver."

82 EXHIBIT N.

Filed April 16, 1902.

Before the General Land Office.

J. F. ELWOOD ET AL., Mineral Protestants,
vs.
C. W. CLARKE, Forest Lieu Selector. } 45343.

Involving forest lieu selected No. 127, for the N. ½ of S. E. ¼ of sec. 4, T. 29 S., R. 28 E., M. D. M., Visalia, California, land district.

Motion to Dismiss Protests.

Comes now C. W. Clarke, by his attorney, Horace F. Clarke, and moves that the Hon. Commissioner of the General Land Office do now dismiss that certain protest filed against his forest lieu selection No. 128, Visalia, California, series, on February 6, 1900, by the Kern Oil Company, and that certain protest filed against his said selection on February 12, 1900, by J. F. Elwood *et al.*, and bases this motion upon the following grounds, to wit:

1. That said protests fail to set up any cause of action against said selection.

2. That the mere general allegations in said protests contained, of the mineral character of the land involved are palpably based upon alleged discoveries of pretroleum upon neighboring tracks.

3. That said protests show upon their face, assuming all statements therein to be true, that but one discovery has been made upon the land involved, which comprises two forty-acre legal subdivisions.

83 4. That said protests are vague and indefinite.

5. That it is not alleged as a fact, under oath, that said Kern Oil Company is a citizen of the United States.

* * * * * * *

In view of all the foregoing, we pray that said protests be forthwith dismissed, and that said selection No. 127 be immediately passed to patent.

Respectfully submitted,

C. W. CLARKE, *Selector*,
By his attorney, HORACE F. CLARK.

84 EXHIBIT O.

Filed April 16, 1902.

Before the General Land Office.

J. F. ELWOOD ET AL., Protestants,
vs.
C. W. CLARKE, Forest Lieu Selector.

Involving forest lieu selection No. 128, for S. ½ of N. E. ¼ of sec. 4, T. 29 S., R. 28 E., M. D. M., Visalia, California, land district.

Motion to Dismiss Protests.

Comes now C. W. Clarke, forest lieu claimant, by his attorney, Horace F. Clarke, and moves that the Hon. Commissioner of the General Land Office do now dismiss the protests of J. F. Elwood *et al.*, filed against his forest lieu selection No. 128, Visalia, California, series, upon the following grounds, to wit:

1. Because the first protest filed is made without verification, by one signing himself as attorney for protestant, whose authority so to act is not shown.

2. Because said protests fail to state, positively and unequivalocally, that any petroleum or other mineral in appreciable quantities was ever discovered upon the land here involved, prior to the date of the selection in question.

3. Because the mere general allegations of the mineral character of the land involved are palpably based either upon alleged discoveries upon neighboring lands or upon discoveries made after the date of said selection.

85 4. Because it is practically admitted that the location of the so-called Fossil placer claim was void for want of an actual discovery of a mineral deposit thereon.

5. Because said protests are indefinite, vague and ambiguous, and set up no *facts* sufficient to constitute a cause of action.

* * * * * * *

We accordingly pray that said protests be forthwith dismissed and that a patent be at once issued upon said selection of Clarke.

Respectfully submitted,

SELECTION CLAIMANT,
By —— ——, *His Attorney.*

EXHIBIT "R."

Filed April 16, 1902.

* * * * * * *

"N." DEPARTMENT OF THE INTERIOR, H. G. P.
G. F. P. GENERAL LAND OFFICE,
WASHINGTON, D. C., *December* 18, 1900.

KERN RIVER OIL CO. *v.* C. W. CLARKE. } Selections under Act of June 4, 1897.

Register and receiver, Visalia, California.

SIRS: December 14, 1899, C. W. Clarke, claiming title to
86 lands in a forest reservation, filed in your office, in exchange for said lands, his two separate selections for N. ½ S. E. ¼ and for S. ½ N. E. ¼, sec. 4, T. 29 N., R. 28 E., M. D. M., which selections you duly forwarded to this office where they have been numbered 1772 and 1774 respectively. These selections cover adjoining tracts and involve the same questions and parties. They are to be considered as one case for the purposes of this decision for reasons which will hereinafter appear.

These selections are made under the following provision of the act of June 4, 1897, 30 Stats. p. 36.

That in cases in which a tract covered by an unperfected *bona fide* claim, or by a patent, is included within the limits of a public forest reservation the settler or owner thereof may, if he desires to do so, relinquish the tract to the Government and may select in lieu thereof a tract of vacant land, open to settlement, not exceeding in area the tract covered by his claim or patent; and no charge shall be made in such cases for making the entry of record or issuing the patent to cover the tract selected; *provided further*, that in cases of unperfected claims the requirements of the laws respecting settlement, residence, improvements and so forth are complied with on the new claims, credit being allowed for the time spent on the relinquished claims. By the circular of June 30, 1897, appoved by the Secretary of the Interior, regulations were prescribed for the purpose of carrying the provisions of said act into effect. May 9, 1899 and November 15, 1899 (amended December 18, 1899, 29 L. D. 395) the Secretary issued additional instructions, the former relating to selections on unsurveyed lands, the latter requiring publication under certain conditions of the selections. Under the circular of November 15,

1899, *supra*, notice of these selections was given, in response to which protests were filed in your office by the Kern River Oil Co. *et*
87 *al.* alleging the lands to be mineral and claiming them under mineral locations made prior to the date of said selections.

About the time these selections were made, it was represented to this office that the lands in this and a large number of adjoining townships were solely valuable for their petroleum deposits for which they had been located under the mining laws and for which they were being developed. It was further represented that the survey of the lands made over forty years ago, made no reference to mineral, and returned the lands as agricultural, that the lands remained unclaimed, under the agricultural laws until after their location as mineral, when parties sought to select the lands under the above act. Sufficient was presented to show the great importance of the issues involved and the necessity that prompt action be taken to preserve the rights of all parties, consequently, the lands in this and adjoining townships were suspended from disposition (the lands in this township being suspended by telegram to your office dated February 21, 1900) until after an examination of their character by special agents.

The above selections fairly represent the questions involved in a large number or cases which have been pending in this office, awaiting the result of the special agent's examination. The special agent has made a special report as to several selections including those under consideration.

Pending the determination by the proper tribunal of the question of the character of the land selected, some of the selectors sought the aid of the courts to have the mineral claimants enjoined from
88 taking and disposing of the oil, for which the mineral claims had proven of great value. As a result, this office has the benefit of two divergent decisions by the same court, which discuss the matters involved, so profoundly as to secure for them the largest measure of the consideration always given to the opinion of the courts. I am asked also to consider in this case elaborate briefs by counsel for both parties filed in other cases, and the comprehensive character of these briefs serves but to emphasize the importance of the questions involved.

You recommend that a hearing be ordered on the protests in these selections 1772 and 1774, which recommendation will be given due weight as will also the special agent's report hereinafter referred to.

The protests against these selections and the additional affidavits since filed in support thereof have been met in this office by a motion to dismiss the same, filed by resident counsel for the selector. It was stated by Judge Ross in the cases hereafter referred to, that the jurisdiction to determine the question of the character of the land, rested solely in the Land Department. See also Steel *v.* Smelting Co. 106 U. S. 447; Cornelius *v.* Kessel 128 U. S. 456; Ferrell *et al. v.* Hoge *et al.* 29 L. D. 12. It has also been held that oil or petroleum is a mineral and that lands chiefly valuable therefor cannot

be disposed of under agricultural laws. Union Oil Co., 25 L. D. 351; Phifer *v.* Heaton, 27 L. D. 57, and McQuiddy *v.* State of California, 29 L. D. 181, act Feb'y 11, 1897, 29 Stats. 526.

The material allegations of all the protests against these selections are believed to be embodied in the following extract from the protest of the Kern River Oil Co. filed against both selections:

89 That on or about the 11th day of June, 1899, J. F. Elwood, H. M. Rodgers, Frank R. Lindsay, D. S. Snodgrass, V. I. Willis, F. M. Garrison, F. K. Wiseman and Geo. L. Hoxie, then being citizens of the United States, and over the age of twenty-one years, as an association of eight persons, made location of certain consolidated placer mining claims, under the laws of the United States, and which placer mining claims were known as the "Fossil" placer mining claim, being the N. E. ¼ of sec. 4 and the "June Bug" placer mining claim, being the N. ½ of the S. E. ¼ of said section 4, all in T. 29 S., R. 28 E., M. D. B & M. At the time of making said locations, the locators thereof distinctly marked the boundaries of said placer mining claim-, and each of them so that the lines could be readily traced, and built initial monuments, and corner monuments and set intermediate stakes between said corner monuments, so that any person going upon the ground could readily trace the lines, and posted notices of location on the claims, and each of them, which notices contained a description of the claim, and the names of the locators, and the date of location and which notice was recorded in the office of the county recorder of the county of Kern; a certified copy of which is hereto attached, and made a part hereof.

That at the time of making said locations, the locators thereof had made such discovery of mineral as to entitle them to make the said location, and thereupon, said locators entered into possession of said mining claims, and each of them, and worked and developed the same, and sunk wells upon said mining claims and each of them, and in sinking said wells discovered petroleum in paying quantities upon each of said claims, which wells were respectively: on the June Bug placer to a depth of 122 feet; and on the Fossell placer to a depth of 130, and were prospect wells, sunk for the purpose of fully prospecting the said claims.

These selections are limited by law to lands "vacant and open to settlement." Whatever other meaning may be claimed for that phrase, it must be admitted that only non-mineral lands are subject to settlement and therefore, only such lands are subject to selection. It is the policy of the Government to reserve mineral lands, even in the absence of express reservation. Sec. 2318 R. S., Ivanhoe M. Co., Keystone M. Co., 102 U. S. 167, Keystone Lode and Millsite *v.* Nevada, 15 L. D. 259, State of Utah *vs.* Allen *et al.* (27 L. D. 53). Claimants under these selections must therefore be held to fall in the class of agricultural claimants as contradictinguished from mineral claimants.

90 As above stated, regulations were prescribed for claimants seeking the benefit of said act of June 4, 1897, *supra*, which, required the submission of certain proof. This proof has been

furnished in these cases. In addition to this, a non-mineral affidavit accompanies all selections. It is contended however, that this non-mineral affidavit is not required by the statute or by the regulations under this statute, and is wholly inapplicable to this class of cases. Since the year 1871, soon following the organization of the mineral division of this office, non-mineral affidavits of the present form have been required to be filed in all entries or filings for non-mineral lands. It has been required by the general circulars of the office down to and including the circular of July 11, 1899, and it is recognized as part of the proof in these selections, Secretary's instructions March 6, 1900, 29 L. D. 580. The non-mineral affidavit is to these selections what it is to the homesteader and what it is to every claimant for the public lands. It is universally recognized that claimants seeking title to the public lands will satisfy themselves as to the conditions, character and advantages of the lands they seek, whether it is vacant or adversely claimed or whether it is of the character subject to their claim. It is upon this affidavit that the claim is made. It is upon these representations, as much as upon the showing of their records, that the local officers accept the filing.

The following non-mineral affidavits filed in the above selections are made by the same person and follow the prescribed form, except the underscored portions have been interpolated by affiant who has crossed out the portions so marked.

91 [that there is no occupation of said land adverse to the selection thereof under the act of June 4, 1897, by]* That the tract applied for is agricultural in character and contains no known deposits of coal, or other minerals, and is not subject to entry under the coal or mineral land laws of the United States; *this affidavit is made upon the evidence found on the surface, of the ground. Deponent does not undertake to express any opinion as to what may be under the ground.*

That he has frequently passed over the same and his personal knowledge of said land is such as to enable him to testify understandingly in regard thereto; that there is not to his knowledge within the limits thereof, any vein or lode of quartz or other rock in place, bearing gold, silver, cinnabar, lead, tin or copper, or any deposit of coal; that there is not within the limits of said land, to his knowledge, any placer, cement, gravel, or other valuable mineral deposit; [that no portion of said land is claimed for mining purposes under the local customs or rules of miners or otherwise;]* that no portion of said land is worked for mineral during any part of the year by any person or persons; that said land is essentially non-mineral land and that the application therefor is not made for the purpose of fraudulently obtaining title to mineral land, but with the object of securing said land for agricultural purposes, *so far as deponent knows;* and that the above and foregoing statements as to the character of said land apply to each and every legal subdivis-

[* Words enclosed in brackets erased in copy.]

ion thereof, and that his post-office address is *420 California St., San Francisco, California.*

(Signed) A. BARION.

A careful reading of this affidavit discloses the purposes of the defense. It is practically admitted that mining claims cover the land but it is denied that mineral had been discovered at the date of filing the selection in the local office and because of this that the mining claims are no bar to the selection, and that the conditions known to exist at that date determine the rights under the selection. In other words, it is contended that under the act of June 4, 1897, a vested right attached at date of selections which a subsequent discovery of mineral could not defeat. This point is the keystone of the entire structure, and upon it the selectors and their successors in interest rest their case.

In the case of The Olive Land and Developement Company *v.* Olmstead, *et al.* 103 Fed. Rep. 568, which was a suit to quiet title to a selection under said act against one claiming under a mining location, Judge Ross held, July 9, 1900:

92 In all cases the land authorized to be selected in lieu of that relinquished is required to be vacant and open to settlement. When? Manifestly at the date of selection. It is upon its then character and condition, that the selector has the right and is bound to act. Before making his selection he must inform himself of the character and condition of the tract desired, but it would be wholly unreasonable to say that he is required to make a selection based upon what may be disclosed in that regard in the future. The right to select is by the statute given to the party invited by the Government to make the exchange, without other condition than that the land selected shall be vacant and open to settlement.

In the similar case of The Cosmos Exploration Company *et al. v.* Gray Eagle Oil Company *et al.* 104 Fed. Rep., Judge Ross held, Sept. 24, 1900, referring to his former decision, that:

In the main what was then said is correct even as applied to the facts, statutory provisions and rules and regulations of the Land Department presented in the present cases; * * *

As has been stated, it did not appear in the case of Olive Land and Developement Company *v.* Olmstead that any rules or regulations had ever been made pursuant to the provisions of the act of June 4, 1897. * * * In the absence of all rules and regulations upon the subject the court treated and I think properly treated such acceptance as an approval of the selection. * * * The selection as has been seen consists of two things. First, the act of selection upon the part of the selector, and second, the approval of his selection by the Land Department. Both acts are essential to constitute the selection authorized by the statute. * * * (The court here proceeds to consider the rules and regulations.) * * * The rules and regulations mentioned are in no respect inconsistent with the provisions of the statute, are reasonable and are therefore valid and have the same force and effect as statutory provisions.

From then it is clear that the officers of the local land office are not empowered to approve any selection under the act of June 4, 1897, but are expressly required to refer the questions in respect to the condition and character of the land sought to be selected to the General Land Office for consideration and that there the power rests to determine the second of the two essential things necessary to constitute a selection under the act of June 4, 1897, viz. whether the land sought is vacant and open to settlement.

This latter opinion of the court was the opinion of the department February 28, 1900. A. J. Harrell 29 L. D. 553, when it held referring to the character of the land and adverse claims.

These matters will remain open to inquiry and determination by the Land Department in a proper way as in other cases arising under the public land laws, until the issuance of patent. * * *

93 The exchange becomes complete, in contemplation of law, upon the approval of the selection and it ought not to have been disturbed in a manner different from that in which a final entry would be disturbed.

But it is contended that the later ruling of the department in the cases of Gideon F. McDonald 30 L. D. 124 and Clarke *v.* N. P. R. R. Co. 30 L. D. 145, should govern in this case. That ruling is as follows:

By his deed of relinquishment and reconveyance to the United States of his own land situate within the boundaries of the forest reserve, and by his selection of the lieu land, McDonald accepted the standing offer or proposal of the Government contained in the act of June 4, 1897, and complied with its conditions, thereby converting the mere offer or proposal of the Government into a contract fully executed upon his part, and in the execution of which by the Government he had a vested right.

I am not convinced that counsel has correctly interpreted these later decision- of the department or that they conclude this office from considering the question.

The court referred to said decision when it held that "the exchange once made" could not be rendered nugatory by any future discovery of mineral.

It is contended that the act of relinquishment and the act of selection must be contemporaneous, under the ruling of the department, that one cannot be made without the other, that therefore the rights under the selection must be the date *of* the relinquishment is filed in the local office with the selection, that it cannot be treated as an "application to select" but is an actual selection the mere filing of which vests the right of the selector in the land selected. This is not the reasoning in the Cosmos and Harrell cases *supra*. In Departmental Instructions of June 30, 1897, it is designated as an application for change of entry or settlement which "must be forwarded by the local officers to the Commissioner of the General Land Office, together with report as to the status of the tract applied for." It is thus seen that the

presentation of a selection application to the R. and R.
94 is not that it shall be filed there, or that its regularity or validity shall be passed on, but merely that it shall be transmitted to this office, where it shall in the first instance be examined and an ascertainment had as to whether all the requirements, both of the law and regulations have been met, and this is evidenced by an approval. The act of Congress of June 6, 1900, 31 Stats. abridging the right to make selections under said act of June 4, 1897, *supra*, after October 1, 1900, to surveyed lands, construes the filing in the local office as an application by providing that nothing therein contained "shall affect the rights of those who previous to October first, nineteen hundred shall have delivered to the United States, deeds for lands within forest reservations and make application for specific lands in lieu thereof." The department also considered the forms under which it is required that the selections be approved by this office, and of which the local officers and parties must be advised. In Cornelius *v.* Kessel, 128 U. S. 456, cited by Judge Ross in the Cosmos case, it is held:

The power of supervision possessed by the Commissioner of the General Land Office over the acts of the register and receiver of the local land office in the disposition of the public lands undoubtedly authorizes him to correct and annul entries of land allowed by them where the lands are not subject to entry or the parties do not possess the qualifications required. * * * But the power of supervision and correction is not an unlimited or an arbitrary power. It can be exercised only when the entry was made upon false testimony or without authority of law. It cannot be exercised so as to deprive any person of land lawfully entered and paid for.

There can be no question that this is an entry in the same sense that every filing for public land is an entry, but that it is a final entry is no more true than that a homestead application, when filed in the local office, is a final entry. It is admitted by all parties that
one who enters public land is entitled to a patent only when
95 he has done all that he is required to do under the provision of law through which he seeks title. When this is done, his rights vest and the conditions then existing fix the status of the land and that is all there is in the numerous citations by counsel on this point. It should, however, be noticed that usually the fact that all the requirements have been complied with is evidenced by the issuance of a certificate of entry, while in these cases, the evidence of that fact is the approval of the selections by this office.

From what has heretofore been said it is seen that those claiming under the act of June 4, 1897, *supra*, have not done all they are required to do until they have filed the proof required, made proof of the publication of notice and the same has been approved by this office. This is the only reasonable and equitable course possible under the law and has the support of the court in the Cosmos case *supra*. In the face of the ruling of the department in the Harrell case, and in view of the fact that the court did not find the McDonald and Clarke cases inimical to this ruling, I am not convinced that

the department, in those later cases intended that the principle therein enunciated, should govern in cases where the question of the character of the land is involved.

There the question was whether the right to a selection could be defeated by a subsequent withdrawal of the land, here the question is between two claimants as to the character of the land. The analogy between a homestead entry and these selections, in this particular, is complete in that the homestead entry "appropriates and segregates" the land but does not fix its character until the entryman has done all that he is required to do and has received his
96 final certificate, so in these selections, until the selector has complied with the requirements of the department, he cannot be said to have done all he is required to do, if so, he could with just as much reason, refuse to furnish the required proof of publication of notice because not required by statute, and claim his patent because he had filed his selection.

Applications to make entry under section 2306 U. S. R. S. also furnish an analogy to this case. There the application is filed in the local office where it is noted upon the record, and forwarded to this office. The proof is here examined and if found sufficient, it is approved and the local officers directed to allow the issuance of final certificate. Until this is done the land is open to exploration under the mining laws.

If further reasons were necessary for the holding herein it might be contended that, as in the case of State and railroad grants, the character of land, selected either by a State or railroad in lieu of land lost under its grant is open to question until patent has issued or certification where patent is not required. Barden *v.* U. S. 154 U. S. 288, Mullan *v.* — 118 U. S. 271, Swank *v.* State of California, 27 L. D. 411, McQuiddy *v.* State of California, 29 L. D. 181.

Under this ruling, therefore, the land in these selections is yet open to exploration under the mining laws and if at this date the lands are shown to be mineral it defeats the selections. The opinion of this office expressed in the last annual report and referred to by the selectors in support of their position, cannot be taken as governing the office in the present case. It was a recommendation, only for further legislation, and the McDonald case therein cited did not, as heretofore stated, involve a consideration of
97 facts, as now presented.

But even the claim of the selector's resident counsel that there was no discovery at date of selection and that therefore his right attached at that date, is met by specific affidavits. The presumption in favor of the selection, arising from the character of the tract as shown by the records of the local land office, is weakened by the affidavits of the mineral claimants to the contrary, especially as that presumption rests upon the affidavit of Barion. Affidavits are on file alleging:

That he, as one of the locators of said "June Bug" placer mining claim, caused a well to be bored upon said placer mining claim beginning in the latter part of June, 1899, and completed during the

month of July of said year. That in boring said well, petroleum in large quantities was found and penetrated at a depth of one hundred and twenty-two feet, and showed the lands to be of more than extraordinary value for petroleum mining. (From Hoxie's affidavit.)

That during the month of July, 1899, the locators of said "Fossil" placer mining claim caused a well to be drilled or bored upon said placer mining claim, which work was done under the direct supervision of this affiant. That in drilling said well, oil and oil sands were first penetrated at a depth of about one hundred feet, and the said well was continued to a depth of about — hundred and thirty feet, and at said depth of 130 feet, petroleum in such quantities was found as to assure the great value of said claim, for petroleum mining, and would produce at least from three to four barrels of petroleum per day. (From Lindsay's affidavit.)

But selector's resident counsel contends that if there was a discovery upon the Fossil claim it was not upon the S. ½ N. E. ¼, included therein, and that if there was a discovery upon the June Bug claim, the failure to designate upon which subdivision it is situate, defeats the claim. Counsel cannot pretend to believe that more than one discovery is necessary in a claim, whether that claim contain 20 acres or 160 acres, or that the discovery must be upon any particular legal subdivision.

It is held that one discovery upon a claim, whether it be of twenty acres or of one hundred and sixty acres is sufficient to authorize a placer location thereof, but in neither case is it held either
98 directly or by intendment that such discovery is conclusive as to the mineral character of the entire claim or that all the land therein can be acquired as appurtenant to the mineral deposits in the portion containing the discovery. Ferrell *et al. v.* Hoge *et al.* 29 L. D. 12.

See also Union Oil Co., 25 L. D. 351.

To determine the mineral character of the entire claim requires a hearing where proof may be taken, the right to which selector's counsel seeks to deprive the mineral claimants who are entitled to be heard and to have their claims protected, if the allegations of the protest are established to be true. But the selector seeks to evade the effect of the allegations of the mineral claimants, by drawing a distinction between "known mines" and "mineral lands" and expends much effect and cites numerous decisions of the court and the department in the attempt. But this is a distinction without a difference. Since the pre-emption act of 1841, wherein the words "known mines" occur, to the act of 1891, repealing said pre-emption act and down to the present time, all mining legislation and the construction thereof by the courts and the Land Department have uniformly recognized that lands containing "valuable mineral deposits" are excepted from disposition, except under the mining laws. Nor can there be any question that the lands must be known to be mineral when the right to a patent vested and that the subsequent discovery of mineral would not defeat such right.

But the selector would give to the word "known" some unusual power in establishing the character of the public lands and attempts to lay down the rule citing many decisions in support thereof, that the land must contain known mines which are being developed at the date the right to a patent vested. Mining locations are not made upon known mines, and to require such a showing would
99 make all mining locations void and render invalid many mineral patents which are being daily issued by this office. The prospector and miner "upon invitation of the owner of the land, the United States" finds indications of the existence of minerals in sufficient quantities to make the lands chiefly valuable therefor, and thereupon locates it as mineral land, and

One who is in actual possession of a mining claim, working it for the minerals it contains and claiming it under the laws of the United States whether the location under which he so claims is valid or invalid cannot be forcibly, surreptitiously, clandestinely or otherwise fraudulently intruded upon or ousted while he is asleep in his cabin or temporarily absent from his claim.

Nevada Sierra Oil Co. *v.* Home Oil Co. 98 Fed. Rep. 673, see also Cosmos case, *supra*, Atherton *v.* Fowler, 96 U. S. 513, Haws *v.* Victoria C. M. Co. 160 U. S. 303.

The indications that may be made the basis for a mining location are not to be confounded with the proof required as to the existence of mineral when the question of the character of the land is in contest. In the former, slight evidence of the existence of mineral is sufficient, but in the latter, it must be shown that the mineral thereon makes the lands clearly valuable therefor. The ruling that has become a settled principle in the matter of determining the relative character of lands in contest is found in the following language in a leading case:

After a careful consideration of the subject, it is my opinion, that where minerals have been found and the evidence is of such a character that a person of ordinary prudence will be justified in further expenditure of his labor and means, with a reasonable prospect of success in developing a valuable mine, the requirements of the statute have been met. To hold otherwise would tend to make of little avail, if not entirely nugatory, that provision of the law whereby "all valuable mineral deposits in the land belonging to the United States" are declared to be free and open to exploration and purchase, for if as soon as the minerals are shown to exist and at any time during the exploration, before the returns become remunerative, the lands are to be subject to other disposition, few would be found willing to risk time and capital in attempting to bring to light and make available the mineral wealth which lies concealed in the bowels of the earth, as Congress must have obviously
100 intended the explorer to have an opportunity to do. (Castle *v.* Womble 19 L. D. 455.)

This is in line with Davis Adm'rs *v.* Wiebbold, 139 U. S. 507 characterizing lands as mineral which are known to be so valuable

as to justify expenditure for their extraction. Also John Downs, 7 L. D. 71. The mining claim need not show any profits to have the land stamped as mineral, Caledonia M. Co. *v.* Rowen, 2 L. D. 714, see also Royal K. Placer 13 L. D. 86. Johns *vs.* March 15 L. D. 196, Rucker *v.* Kuiseley 14 L. D. 113, Brown *v.* Schmidt, Sec't'y, March 16, 1896, Chatham *v.* State of California, Sec't'y July 21, 1899, Magruder *v.* O. & C. R. R. 28 L. D. 171, Mike Starr M. Co. 143 U. S. 394. Congress has also given a construction to this question in the act of February 26, 1895, 28 Stats. 683, providing for the segregation of mineral lands in certain limits of the N. P. R. R. Co.

That all lands shall be classified as mineral which by reason of valuable mineral deposits are open to exploration, occupation and purchase, and under the provisions of the United States mining laws, and the Commissioner, in making the classification hereinafter provided for shall take into consideration the mineral discovered or developed on or adjacent to such land, and the geological formation of all lands to be examined and classified, or the lands adjacent thereto, and the reasonable probability of such land containing valuable mineral deposits because of its said formation, location or character * * * provided that the word "mineral," where it appears in this act, shall not be held to include iron or coal.

These mineral claimants made mining locations of these lands much as the above commissioners classified lands as mineral, but they did not rest their claims upon the discoveries claimed to have been made. In the wells that within a reasonable time after location were sunk to a depth of at least 122 feet, the mineral claimants proved their professional judgment, and there are now on file in this office affidavits supported by photographs showing that on land including a portion of each of these mining claims there are seven wells ranging down in close proximity from a depth of 760
101 feet sunk at a cost of $3672 "with a daily production of 135 barrels." It does not seem that any question could arise as to who had the best right to this land and to whom the mineral product belongs. Even if no wells had been sunk at the date of the selections and the mining claimants had rested solely upon the surface discoveries but were duly proceeding with reasonable diligence to develop the claims, the agricultural claimants would not have been entitled to the land as "vacant land open to settlement." On this point in the Cosmos case *supra* Judge Ross held:

It is, to say the least, doubtful if persons authorized to select vacant land only, are authorized to select lands in the actual *bona fide* occupancy of others under the settlement laws, or under a mining location, even though, in the case of the latter, the location be invalid by reason of the absence of a valid discovery of mineral (Shaw *vs.* Kellogg, 170 U. S. 312, 332); but they are certainly not authorized to effect such selection by any sort of fraud or circumlocution. Nevada-Sierra Oil Co. *vs.* Home Oil Co., 98 Fed. Rep. 673, 680.

If the lands are not distinctly agricultural in character but in addition contain on the surface mineral indications, justifying a dis-

creet person to prospect and develop the same, then the affidavit which avers: "that the application therefor is not made for the purpose of fraudulently obtaining title to mineral land, but with the object of securing said land for agricultural purposes so far as the deponent knows," is not only evasive but misleading and evidences a motive for acquiring the lands really for mineral and not for agricultural purposes.

The peculiar formation of this mineral deposit and the difficulties that are met with in the application of the mining laws to these different conditions are fully appreciated but I am convinced that if the mining laws are given the broad and liberal interpretation intended for them and especially if it be disclosed that mineral oil conditions can be and are determined by certain fixed surface indications they will be found sufficient for these cases which have arisen since their creation and which could not possibly have been foreseen. This was evidently the opinion of Congress when (Feb'y 11, 1897, 29 Stats. 526) it provided:

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That any person authorized to enter lands under the mining laws of the United States may enter and obtain patent to lands containing petroleum or other mineral oils and chiefly valuable therefor under the provisions of the laws relating to placer claims.

In the matter of the petroleum formation, I am impressed with the views of one of the mineral claimants' attorneys, which is in part as follows:

Science has taught me that if I found this quartz formation between true defined walls, it would lead me to a large body of ore, gold, silver, or copper, according to the conditions of the ore. So it is with the petroleum miner; no man who has ever known of the petroleum fields has ever known petroleum to be in large and paying quantities upon the surface. The nature of the mineral itself is such that it is against common sense, reason or science to hold that before a petroleum miner can make a location, he must have an oil well which will produce from 30 to 75 barrels of petroleum per day. No such thing exists; no such thing has or ever will exist, but the petroleum miner as he goes and takes up his location, takes it up in good faith upon the indication that he has found upon the surface.

Science has taught me that invariably where these evaporations have occurred and the residuum of petroleum has been left upon the surface, there have been and still are large quantities of petroleum beneath. The reason for this is that in connection with petroleum usually, large quantities of gas *is* found; they are akin to each other, and by this means petroleum has been forced to the surface and gives the petroleum miner what is the same as to the quartz miner, a lead going to a large and rich body which lies underneath.

The good faith of the mineral claimants is apparent and conclusive. They seek to obtain, in a proper manner, title to lands under laws solely provided therefor; I do not find the same conditions existing in the case of the agricultural claimant, who evasively seeks to acquire mineral lands under agricult-

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ural laws, the lands being admittedly mineral and not agricultural. In the Cosmos and Olive cases, *supra*, the selectors, claiming under laws that permitted the disposition of the non-mineral lands only, sought to have mineral claimants enjoined from producing oil from mining claims which their predecessors had located in good faith and which they had developed at great cost. And this as to lands which had apparently possessed but little inducement for the agricultural claimant. In other words, the selector, without cost or labor to himself, seeks to reap where others have sown, a claim to which equity gives its unqualified dissent, Cosmos case *supra*, see also Atherton *v.* Fowler, 96 U. S. 513, Rector *v.* U. S. 92 U. S. 698.

The above selections cover land surveyed August 6, 1854, and returned as "undulating with a fair 2″-rate soil to first-rate soil along Kern river." Of this section 4, during all this time, only 80 acres have been entered upon the records under any of the public land laws. These mining claims were located in June 1899, but despite that fact, in December 1899, this selector of agricultural lands comes to the Land Department with affidavits in all material respects similar to those which the court pronounced palpably false and seeks its sanction and support in his efforts to secure what equity has denied claimants in other cases. He disingenuously argues that although these mining claims contained evidences of mineral, they did not produce it in paying quantities, and, therefore, the mineral products subsequently obtained, often in such marvelous quantities, belonged not to the mineral claimant who had produced them but to the agricultural claimant who had stood by. The motive is obvious and when, as in this case, it seeks to vio-
104 late the right of another it may be considered. Cosmos case *supra*, U. S. *v.* Culver, 51 Fed. Rep. 81, Hanchett *v.* Chitovich 101 Fed. Rep. 942.

The act of June 4, 1897, may have been intended to be remedial, but it cannot have been intended to be an instrument for the usurpation of property rights. It may be a standing offer to exchange lands in a forest reserve for vacant lands open to settlement, but it does not contemplate the seizure of private property held under statutory rights as in the case of mining claims. Nor can the selector hide behind the claim that just because the Land Office records show no such claim, the lands are, therefore, vacant and open to settlement.

One who has made a mining location upon the public land in the manner provided for in the statute and in conformity with the local laws and regulations of miners, has a qualified title to the land which may be bought and sold as other property, Silver Bow M. & M. Co. *v.* Clark, 5 Mont., 378. He is not bound to apply for a patent or to pay for the use of the land. Chapman *v.* Toy Long, 4 Sawyer, 28. Therefore, he is not required to give the Land Department notice of his claim in order to give him a vested right to the land. By his location he has segregated the land from the public domain, St. Louis M. Co., 171 U. S., 650, and has the exclusive right of possession and enjoyment of all the surface included within the

lines of his claim, Belk *v.* Meagher, 104 U. S., 279; Gwillim *v.* Donnellan, 115 U. S., 45; Noyes *v.* Mantle, 127 U. S., 348; Sullivan *v.* Iron Silver M. Co., 143 U. S., 431. Whether that claim is valid or whether the land is vacant and open to settlement is not left to the agricultural claimant to decide, merely by his affidavit, especially where he
105 fails to state the facts or thinly disguises them. Congress has entrusted the Land Department with the determination of whether a mining claim contains valuable minerals, Steel *v.* St. Louis M. Co. 106 U. S. 447, Coleman *vs.* McKenzie, (28 L. D. 348). If the agricultural claimant stated the facts, the local officers should have required him to give the mineral claimant notice of the proposed filing. He is on the land in personal occupancy and under color of right and should be allowed an opportunity to show that the land possessed minerals in paying quantities, in which event his rights would relate back to the date of location. See Lindley on Mines, par. 219, Belk *v.* Meagher, 3 Mont. 65. I am not unmindful of the recent ruling that the Land Department has no control over a mineral claimant until he seeks patent, but such ruling (Barklage *et al. v.* Russell *et al.*, 29 L. D. 401) only holds that questions arising between rival mineral claimants as to the right of possession are solely matters for the courts and did not hold that the department, at any time prior to patent, is ousted of its jurisdiction to determine under what provision of the public land law patent shall issue.

From the foregoing, I would deduce the following: That at the date of these selections, the lands included therein were covered by mining claims and therefore not vacant; that they were known to contain mineral and, therefore, were not open to settlement; that the fact that these conditions were not of record in the Land Office did not affect the mineral locator's rights, and that the failure of the agricultural claimant, to state the facts was a fraud on the Government and the mineral claimant, as the selectors are charged with notice of mining locations. If any further evidence were
106 needed in support of the above conclusions, it is to be found in the special agent's report, made with reference to these particular selections, nor can there be any question of the authority of this office to consider such report, in connection with the record in this case, the Government always being an interested party in the determination of the character of the public land and this office being charged with the proper disposition of such lands.

The special agent's report is strong and convincing, is supported by affidavits and concludes with the following recommendation:

I recommend that this application be not only disallowed, but that the matter be placed before the proper authority, and that criminal proceedings be brought against the party who had the effrontery to take the non-mineral oath that was a part of the application. It is a monstrous fraud, and one that the department should prosecute to the bitter end. This 160 acres of land is worth $500,000 for the mineral (oil) there is beneath the surface, for agricultural purposes not 5 cts. an acre.

The instructions governing the manner of proceeding upon special

agents' reports (approved August 18, 1899, 29 L. D. 141) provide as follows:

1. Hereafter, when there is filed in this office a report of a special agent alleging that a certain entry, filing, location, or claim for a specified tract of public lands, is fraudulent, or illegal, or that the claimant has failed to comply with the requirements of law, and the facts presented are sufficient, if true, to warrant the cancellation of the entry or claim, the proper local officers will be promptly advised thereof, and will be directed to serve notice upon the entryman or claimant in the following manner:

2. The notice must specifically define the charges contained in the special agents' report adverse to the entry, filing, location, or
107 claim; and the entryman or claimant shall be advised that he will be allowed thirty days within which to apply for a hearing, and that a failure to apply for such hearing within the prescribed time will be taken as an admission of the truth of the charges.

The further consideration of this case must therefore proceed upon the lines laid down in said instructions with personal service of notice or by publication where personal service cannot be had. If the agricultural claimant applies for a hearing, you will proceed under the instructions and forward the application to this office and in default of such application, after due notice you will report the facts to this office.

Very respectfully, BINGER HERMANN,
Commissioner.

108 DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
WASHINGTON, D. C., *January* 16, 1901.

KERN OIL COMPANY
vs.
C. W. CLARKE.

Forest lieu selections 1772–1774; decision, December 18, 1900.

Register and receiver, Visalia, California.

SIRS: Referring to my decision of December 18, 1900, in the above-entitled case, the same should read "T. 29 S." instead of "T. 29 N.," and "Kern River Oil Company," should read "Kern Oil Company." This is done to correct apparent discrepancies.

Advise parties in interest.

Very respectfully, BINGER HERMANN,
Commissioner.

109 EXHIBIT S.

Filed April 16, 1902.

Before the Department of the Interior.

KERN OIL COMPANY
vs.
C. W. CLARKE. } 45343.

Involving Visalia, California, forest lieu selections 1772 and 1774.

Appeal & Specifications of Error.

Comes now C. W. Clarke, by his attorney Horace F. Clarke, and appeals to the honorable Secretary of the Interior from the decision of the Commissioner of the General Land Office, dated December 18, 1900, and for cause specifies the following reasons and grounds of error, to wit:

The Commissioner has grossly abused the ordinary power and discretion vested in him in ordering a hearing to determine the character of land, in these particulars.

1. That the decision in question rests upon questions of law, each and all of which have been therein erroneously and contrary to the decisions of this department upon the subject.

2. In giving weight to allegations which do not show at the date of the forest lieu selections herein a valid discovery of mineral had been made upon the premises covered thereby.

3. In ordering a hearing to determine the character of land embraced in forest lieu selections, on account of, and for the purpose of taking into consideration, oil discoveries made thereon, after
110 such selections were made, where such selections were made in lieu of patented lands relinquished to the Government.

In the decision complained of, the Commissioner has erred as follows:

1. In assuming that a discovery of mineral or oil upon land returned as agricultural in character, though made subsequent to a forest lieu selection thereof, operates retroactively so as to constitute such land minerals in character in contemplation of law at the date of such selection.

2. In assuming and holding that the act of June 4, 1897, requires selections thereunder to be accompanied by non-mineral affidavits.

3. In holding that when these selections were made, the rules and regulations of the Land Department required *by* non-mineral or other affidavit to accompany selections under the act of June 4, 1897.

4. In holding that the clause stricken out of the non-mineral affidavit used in these cases, namely, "that no portion of said land is claimed for mining purposes under the local rules or customs of miners or otherwise," is material, and that the striking out of such a clause was an evasion of the law.

5. In holding that the purpose, motive or intent of a person making selection of lands under the act of June 4, 1897, is material and constitutes an element in his right of selection.

6. In holding that it was evasive for the maker of the nonmineral affidavits in these cases to insert therein the language
111 "so far as deponent knows," in referring to the purpose of the selector.

7. In holding that it was evasive for the maker of such affidavits to state that the same were based upon the evidences found upon the surface of the ground.

8. In holding that a forest lieu selection in exchange for patented lands relinquished to the Government does not constitute a final entry, and in holding that such a selection was only of the same dignity, force and effect as an original application for a homestead.

9. In holding that a selection under the act of June 4, 1897, does not amount to a final entry or its equivalent until the approval thereof by the Commissioner of the General Land Office.

10. In holding that the publication of notice to adverse claimants prescribed by the rules and regulations of the Land Department, and the proof of such publication and the approval thereof by the Commissioner, are conditions precedent to any rights attaching in favor of the selector, instead of mere conditions subsequent prescribed by the Land Department to enable it to determine as to whether or not the requirements of the law have been met.

11. In holding that the McDonald and Clarke cases, 30 L. D. 124 and 145, have no application to a case where the character of land involved is concerned.

12. In assuming that these selections operated to either "forcibly, surreptitiously, clandestinely or otherwise fraudulently" intrude upon or oust the mineral claimant while asleep in his cabin or temporarily absent from his claim.

112 13. In holding mere surface indications of mineral in the absence of the actual discovery of mineral, to be sufficient to defeat selections under the act of June 4, 1897.

14. In assuming that the mineral land laws are the laws provided for the acquisition of lands which contain no mineral discoveries, as was the case with these lands when they were attempted to be located by mineral claimants.

15. In holding that the good faith of the mineral claimants, in these cases, is apparent and conclusive, and in holding that the contrary was true as to the selection of Clarke.

16. In holding that the selector, Clarke, was evasively seeking to acquire mineral land under agricultural laws, and in holding that these were mineral and not agricultural lands when selected by Clarke.

17. In not holding that the character of these lands was fixed and determined by the known conditions at the date these selections were made, and in not holding that such character thus fixed was agricultural and not mineral.

18. In holding that the selector Clarke is seeking without cost or

labor to reap where others have sown, whereas, it is shown that for every acre of land selected by Clarke, the Government had received from the selector an acre in exchange, and that the mineral claimants had paid nothing and discovered nothing, when such selections were made, and that their investment of money has all been made since such selections were made, with full knowledge of the selector's rights.

113 19. In holding that the selector's motive was material, or that such notice, in these cases, operated to violate the rights of mineral claimants when they had no rights.

20. In assuming that by these selections the usurpation of property rights, or the seizure of private property held under statutory rights is contemplated or sought.

21. In holding that the mere existence of mining claims upon which no mineral discoveries have been made, operates to render lands (though returned as agricultural) not vacant, and hence not subject to selection under the act of June 4, 1897.

22. In holding that the lands in controversy here were known to contain mineral when selected by Clarke, and therefore that the same were not open to settlement or subject to selection by Clarke.

23. In holding that the selector, or his agent who made the non-mineral affidavit, failed to state the facts, and in holding that such failure to state the facts, was a fraud either upon the Government or upon the mineral claimant.

24. In considering in this case the special agent's report, not made public, and to which the selector has had no access.

25. And in giving weight to a report of a special agent, the quoted language of which report shows such special agent to be inimical to this claimant and prejudiced in favor of the mineral protestants.

114 26. In quoting from and giving to the public a defamatory recommendation from the special agent's report, after having reached his conclusions, and made his findings based upon other facts.

27. In publicly quoting a defamatory recommendation of a secret and undisclosed agent, which recommendation is not supported by any facts from such report, set forth in the opinion in question.

28. In holding that the mere occupancy and improvements of a mineral claimant, in the absence of an actual discovery of mineral or oil, prevents land—returned as agricultural—being subject to selection under the act of June 4, 1897.

29. In holding that subsequent mineral developement and subsequent mineral or oil discoveries can impair or defeat prior forest lieu selection properly made.

30. In not holding that the selector, Clarke's, rights in the premises were fixed by the known character and condition of the selected lands at the date they were selected.

31. In holding that lands selected in lieu of patented forest reserve lands relinquished to the Government are open to exploration under the mining laws after the selector, by such relinquishment and

selection, has on his part, fully executed the contract of exchange of lands with the Government.

32. In holding that the mineral claimants are seeking in a proper manner to acquire title to this land.

33. In holding every one of the legal subdivisions involved to be mineral in character upon insufficient allegations and in the
115 face of the selector's claim to the contrary, and in failing to consider that portion of the decision in Ferrell *v.* Hoge (29 L. D., 12) wherein it was held that a single discovery of mineral would support a placer location of 160 acres *only* in the absence of a claim or evidence that any one of the legal subdivisions was not mineral in character.

34. In pronouncing evidence in behalf of the selector false.

35. In deciding that these mineral claimants are holding under a statutory *right* as distinguished from a *claim* under the statute, which appellant insists is unfounded.

36. In finding as a fact that the mineral claimants have locations made "in the manner provided for in the statute and in comformity with the local laws and regulations of miners," in the absence of any proper allegations or proof of that fact.

37. In holding that the forest lieu claimant has failed "to state the facts or thinly disguises them."

38. In assuming legislative functions and declaring that the selector should give specific notice of his selection to any squatter or other person upon the land, no matter how unfounded or preposterous may be the claim of such person.

39. In holding that regardless of the validity or invalidity of a location, the rights of a locator relate to the date of attempted location.

40. In holding that a mining claim or location, regardless
116 of its validity or invalidity, prevents land covered thereby from being subject to forest lieu selection.

41. In prejudging this case and rendering this decision in favor of protestants before any hearing, thereby improperly influencing the register and receiver, and advising them what the facts are and their legal effect in advance of a hearing.

42. In holding and deciding that the selection of the land in controversy, under the law of June 4, 1897, did not then and there vest the right thereto in the selector who had complied with such law in relinquishing his patented forest reserve land to the Government and in making his selection.

43. In holding and deciding in this case that an alleged mining location of land under the placer mining laws, in advance of discovery of oil thereon, operated in law to withdraw said land from selection under the act of June 4, 1897.

44. In holding and deciding that a discovery of oil in the selected land, after selection thereof and before approval by the Commissioner, defeated such selection.

45. In holding and deciding that under the law of June 4, 1897, an approval of selection by the Commissioner of the General Land Office was necessary to give validity thereto.

46. In holding and deciding that the selection of said land, in compliance with the law of June 4, 1897, did not withdraw said land from exploration for minerals under the mineral laws.

47. In holding that the protestants showed any discovery of mineral or oil which established the land in question to
117 be more valuable for mineral or oil than agricultural purposes, when the same was selected by Clarke.

48. In deciding for protestant- and in not deciding for selector.

49. In not dismissing said protests on motion of the selector.

50. In not ordering the patents to said selected lands to issue in favor of selector.

Respectfully submitted.

HORACE F. CLARKE,
Attorney for C. W. Clarke.

EXHIBIT "T."

Filed April 16, 1902.

The cases of Sierra Lumber Co. (22 L. D., 690), and David Walters (24 L. D., 58), cited in support of the appeal, are not controlling. It may be, as contended, that these cases are like the present one, but they are not so stated, and the rulings therein made must be confined to the facts stated. It is said in these cases that the entryman at the time of entry paid all the fees and commissions required by law. This is not true of the present case.

The decision appealed from is affirmed.

LIEU SELECTIONS UNDER THE ACT OF JUNE 4, 1897.

KERN OIL COMPANY ET AL. *v.* CLARKE.

A person making selection under the act of June 4, 1897, who has complied with all the terms and conditions necessary to entitle him to a patent to the selected land, acquires a vested interest therein and is to be regarded as the equitable owner thereof.

The right to a patent under said act, once vested, is, for most purposes, the equivalent of a patent issued; and when in fact issued, the patent relates back to the time when the right to it became fixed, and takes effect as of that date.

Questions respecting the class and character of the selected lands are to be determined by the conditions existing at the time when all requirements necessary to obtaining title have been complied with by the selector, and no change in such conditions, subsequently occurring, can affect his rights.

The land department has the jurisdiction and power, either of its own motion or at the instance of third parties, at any time before patent is issued, and after appropriate notice, to institute and carry on such proceedings as may be necessary to enable it to determine whether the selected lands were of the requisite class and character, and whether the selection was in other respects regular and in conformity with the requirements of the act. But the determination must relate to the time when the selector has done all that is required of him in order to perfect his right to a patent.

The essential requirements to be complied with by a person seeking title to a tract of land in exchange for land covered by a patent in a forest reservation, are:

(1) That he must relinquish to the government the tract in the forest reservation, and submit satisfactory evidence respecting the title thereto;

(2) That he must make selection of the tract desired in exchange for the tract relinquished, and accompany the selection by proof showing the selected land to be of the condition and character subject to selection.

In so far as existing conditions appear from the land office records, no showing by the selector need be made, because the officers of the government must take notice of the public records; but as to conditions the existence or non-existence of which can not be determined by anything appearing upon these records, the required evidence must be furnished by the selector.

See departmental decision, of even date herewith, in the case of the Gray Eagle Oil Company *v.* Clarke, 30 L. D., 570.

Secretary Hitchcock to the Commissioner of the General Land Office.
(W. V. D.) *April 25, 1901.* (A. B. P.)

The act of Congress approved June 4, 1897 (30 Stat., 11, 34–6), among other things, contains various provisions with respect to forest

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reservations, established and to be established under the act of March 3, 1891 (26 Stat., 1095, 1103), one of which is the following:

That in cases in which a tract covered by an unperfected bona fide claim or by a patent is included within the limits of a public forest reservation, the settler or owner thereof may, if he desires to do so, relinquish the tract to the government, and may select in lieu thereof a tract of vacant land open to settlement not exceeding in area the tract covered by his claim or patent; and no charge shall be made in such cases for making the entry of record or issuing the patent to cover the tract selected: *Provided further*, That in cases of unperfected claims the requirements of the law respecting settlement, residence, improvements, and so forth, are complied with on the new claims, credit being allowed for the time spent on the relinquished claims.

By a subsequent act, approved June 6, 1900 (31 Stat., 588, 614), it was declared:

That all selections of land made in lieu of a tract covered by an unperfected bona fide claim, or by a patent, included within a public forest reservation, as provided in the act of June fourth, eighteen hundred and ninety-seven, ... shall be confined to vacant surveyed non-mineral public lands which are subject to homestead entry not exceeding in area the tract covered by such claim or patent: *Provided*, That nothing herein contained shall be construed to affect the rights of those who, previous to October first, nineteen hundred, shall have delivered to the United States deeds for lands within forest reservations and make application for specific tracts of lands in lieu thereof.

December 14, 1899, C. W. Clarke filed in the local office at Visalia, California, two separate selections of lands, in lieu of an equal quantity of lands of which he had become the owner, covered by a patent from the United States and situate within the limits of a public forest reservation. As these selections were filed before October 1, 1900, they are to be governed by the original act, and a consideration of the amendatory act is not here necessary. One of the selections embraces the N. ½ of the SE. ¼ of Sec. 4, T. 29 S., R. 28 E., M. D. M., and the other the S. ½ of the NE. ¼ of said section 4. That the lands within the forest reservation, in lieu of which the selections were made, were seasonably and properly relinquished to the United States, and that the relinquishment was accompanied by a showing of full and unincumbered title in the selector to the relinquished lands, are matters which are not questioned by protestants or your office. Each selection was by an application made out upon a printed form in which no changes were made other than the filling in of blanks. The form of application so used is as follows:

Act of June 4, 1897 (30 Stat., 36).

SELECTION IN LIEU OF LAND IN THE .... FOREST RESERVE, ... LAND DISTRICT, STATE OF ..... CREATED ...., ...

To the REGISTER AND RECEIVER,
United States Land Office,

....., ...

GENTLEMEN: In accordance with the provisions of an act of Congress approved June 4, 1897, entitled "An act making appropriations for sundry civil expenses of

the Government for the fiscal year ending June 30, 1898, and for other purposes," I, ... of ..... County, State of ....., do hereby select and locate the following described tract of ..... land, to wit: .....

.....

.....

In lieu of

.....

.....

The said last mentioned tract is included within the limits of the ..... Forest Reservation in ....., and being the owner, and desiring to select other land in lieu of said tract, I made and executed a deed of reconveyance thereof to the United States on the .... day of ....., 189., as provided by the said Act of June 4, 1897, which said deed has been recorded in the proper county. I therefore ask that a United States patent issue to me for the land hereby selected.

Witness my hand this .... day of ....., 18...

....

Post Office Address ....

The application or selection was accompanied in each instance by an affidavit also made out upon a printed form. Portions of the printed matter in this form were erased and interpolations were made in other portions thereof before the affidavit was verified or filed. The form of affidavit so used, with the erasures shown in small capitals, and the interpolations shown in italics, is as follows:

(Act June 4, 1897.)

AFFIDAVIT OF NON-MINERAL CHARACTER AND NON-OCCUPANCY.

U. S. LAND OFFICE,

.....

.... being duly sworn according to law deposes and says: that he is over the age of 21 years, a citizen of the United States and of the State of ..... and a ..... by ..... and is well acquainted with the character of the following described land and with each and every legal subdivision thereof, to wit:

.....

.....

THAT THERE IS NO OCCUPATION OF SAID LAND ADVERSE TO THE SELECTION THEREOF UNDER THE ACT OF JUNE 4, 1897, BY .... That the tract applied for is agricultural in character and contains no known deposits of coal, or other minerals, and is not subject to entry under the coal or mineral land laws of the United States; *this affidavit is made upon the evidence found upon the surface of the ground. Deponent does not undertake to express any opinion as to what may be under the ground.*

That he has frequently passed over the same and his personal knowledge of said land is such as to enable him to testify understandingly in regard thereto; that there is not to his knowledge, within the limits thereof, any vein or lode of quartz or other rock in place, bearing gold, silver, cinnabar, lead, tin or copper, or any deposit of coal; that there is not within the limits of said land, to his knowledge, any placer, cement, gravel, or other valuable mineral deposits; THAT NO PORTION OF SAID LAND IS CLAIMED FOR MINING PURPOSES UNDER THE LOCAL CUSTOMS OR RULES OF MINERS OR OTHERWISE; that no portion of said land is worked for mineral during any part of the year by any person or persons; that said land is essentially non-mineral land and that the application therefor is not made for the purpose of fraudulently obtaining

title to mineral land, but with the object of securing said land for agricultural purposes, *so far as deponent knows;* and that the above and foregoing statements as to the character of said land apply to each and every legal subdivision thereof, and that his post-office address is .....

....

February 6, 1900, the Kern Oil Company filed a protest against both selections. The allegations of the protest and of the affidavits accompanying the same, are, in substance and effect, as follows: That the Kern Oil Company and its predecessors in interest were, at the date of the filing of said selections, and have been continuously since that time, in the possession and occupancy of the lands covered thereby, claiming, working, and developing the same under certain placer mining locations, made June 11, 1899, known as the "Fossil" and "June Bug" claims; that said lands are of great value for the deposits of petroleum oil contained therein, were known to be valuable for such deposits when the said selections were filed, and are worthless for agricultural purposes; that the lands lie in one of the greatest mineral oil belts in the State of California, and in the immediate vicinity of other valuable oil mining claims; that the oil-bearing formation underlying the land is flat or horizontal, known as a blanket formation; that Clarke well knew the mineral character of the lands when he selected the same; and that the filing of said selections was an endeavor on his part to fraudulently obtain title to mineral lands under the act of June 4, 1897.

February 12, 1900, J. F. Elwood *et al.* filed separate protests against said selections. Possession and occupancy of the lands for oil mining purposes and their known mineral character, at the date when the selections were filed, as well as the worthlessness of the lands for agricultural purposes, are alleged in these protests substantially as in the former protest, and it is further stated that the lands are worth $250 cash per acre on account of the mineral oils contained in them.

The protests and accompanying affidavits were, in due course of business, forwarded to your office, accompanied by the recommendation of the local officers that a hearing be had thereon.

Additional affidavits were subsequently filed on behalf of the protestants. These relate chiefly to work done on the lands by the mineral claimants after the protests were filed, in the boring of wells and the further development of the mining claims, and are generally to the effect that large quantities of oil have been and are being taken from these claims, and that the lands covered thereby, as well as those in the vicinity thereof, have become and are immensely valuable on account of their oil-bearing character.

By decision of December 18, 1900, your office held that the allegations made in the protests against the selections should be investigated,

and gave directions for a hearing. The principles announced in the decision as a guide for the conduct of the hearing, briefly stated, are:

(1) That rights predicated upon the act of June 4, 1897, do not attach to lands selected thereunder until the selector has done all that he is by the law required to do, and the selection has been approved by the land department;

(2) That in the present case the selections have not yet been approved by the land department, and consequently the lands embraced therein have remained open to occupancy or exploration for minerals, and evidence with respect to their present condition, as to whether vacant or occupied, and with respect to their present character, as to whether known to contain valuable mineral deposits or not, is admissible upon an investigation had for the purpose of determining whether or not the selections shall be approved.

Clarke has appealed to the Department. His principal contentions, substantially stated, are:

(1) That the equitable title to lands selected under the act of June 4, 1897, in lieu of patented lands relinquished, vests at the date of selection, and can not be impaired by subsequent mineral discoveries in the lands;

(2) That lands are vacant and open to settlement, and hence subject to selection under said act, when no other claim thereto is disclosed by the land office records, unless, at the date of selection, they are known to contain minerals to such an extent as to make them more valuable on account thereof than for agricultural purposes;

(3) That the protests do not show the selected lands to have been covered by any other claim of record, or to have been known to be more valuable for mineral than for agricultural purposes, at the date when the selections were filed, and are therefore insufficient to justify a hearing.

The opposing contentions of the protestants, appellees, substantially stated, are:

(1) That all lands selected under said act in lieu of relinquished forest reserve lands covered by patent remain open to exploration under the mining laws until the approval of the selection by the land department, and if at any time after the selection and before its approval, the selected land is discovered to contain valuable mineral deposits, its mineral character will be thereby established and the selection defeated.

(2) That lands are vacant and open to settlement, and therefore subject to selection under said act, only when they are unoccupied by others, are free from other claim of record, and are non-mineral in character;

(3) That the protests in this case show, *prima facie*, that the selected lands were occupied by others claiming possessory title thereto under

mining locations duly made and legally asserted, at the date when the selections were filed; that the lands were then known to be mineral in character; and that petroleum oil in large quantities and of great value has been since developed thereon.

It is admitted by the appellant that by reason of mining developments on the lands since the selections were filed, they are now known to be very valuable for the deposits of mineral oils contained in them, and that the protestants, appellees, are in the possession thereof and are daily extracting large quantities of oil therefrom.

Extensive and elaborate printed briefs on behalf of the contending parties have been filed, and the case has been argued orally with great ability and earnestness by counsel on both sides.

The first general legislation on the subject of forest reservations is found in section 24 of the act of March 3, 1891 (26 Stat., 1095, 1103), which reads as follows:

> That the President of the United States may, from time to time, set apart and reserve, in any State or Territory having public land bearing forests, in any part of the public lands wholly or in part covered with timber or undergrowth, whether of commercial value or not, as public reservations, and the President shall, by public proclamation, declare the establishment of such reservations and the limits thereof.

By virtue of the authority thus conferred numerous forest reservations have been established in various States and Territories. As was said in the case of F. A. Hyde *et al.* (28 L. D., 284, 286):

> By the establishment of these reservations many claimants and owners of lands within the reservation boundaries were placed in a state of greater or less isolation from market and business centers, and from church, school, and social advantages, and the value of their property for residence and other purposes was thereby impaired. The withdrawal from settlement and other disposition of the surrounding public lands precluded such persons from obtaining the advantages consequent upon the continuing and increasing settlement which was anticipated when their claims were initiated or their title acquired.

It was with the view to relieving the situation thus described and to promoting the objects for which the reservations were established, that the act of June 4, 1897, was passed. Those objects were, as declared in that act, to improve and protect the forests in the reservations for the purpose of securing conditions favorable to a continuous water flow and to a permanent supply of timber for the use and necessities of the citizens of the United States. Manifestly the government would be greatly assisted in accomplishing the objects desired by securing exclusive ownership and control of the lands within the reservations. The act in question contains an offer by the government to exchange any of its lands that are vacant and open to settlement for a like quantity of lands, within a forest reservation, for which a patent has been issued, or to which an unperfected *bona fide* claim has been acquired. If he desires to accept the offered exchange, the owner or claimant of the tract in the forest reservation can relinquish the same to the govern-

ment and select a tract of public land of like quantity in lieu of the tract relinquished. He is to make the selection, and in doing so he is confined to lands which are both vacant and open to settlement. They must not be occupied by others, nor reserved from settlement on account of their known mineral character or otherwise. With these exceptions the field for selection, except when otherwise specially provided, is co-extensive with the limits of the public domain. Further restrictions are imposed by the amendment of June 6, 1900, but they are not applicable to this case.

When do rights under the selection become vested? In the disposition of the public lands of the United States, under the laws relating thereto, it is settled law: (1) That when a party has complied with all the terms and conditions necessary to the securing of title to a particular tract of land, he acquires a vested interest therein, is regarded as the equitable owner thereof, and thereafter the government holds the legal title in trust for him; (2) that the right to a patent once vested, is, for most purposes, equivalent to a patent issued, and when in fact issued, the patent relates back to the time when the right to it became fixed; and (3) that the conditions with respect to the state or character of the land, as they exist at the time when all the necessary requirements have been complied with by a person seeking title, determine the question whether the land is subject to sale or other disposal, and no change in such conditions, subsequently occurring, can impair or in any manner affect his rights.

The authorities in support of these propositions are numerous. It will be sufficient to refer to a few of them.

In Carroll *v.* Safford (3 How., 441, 461) it was said:

> Now, lands which have been sold by the United States can in no sense be called the property of the United States. They are no more the property of the United States than lands patented. So far as the rights of the purchaser are considered, they are protected under the patent certificate as fully as under the patent. . . . . When sold, the government, until the patent shall issue, holds the mere legal title for the land in trust for the purchaser; and a second purchaser would take the land charged with the trust.

In French *v.* Spencer (21 How., 228) it appeared that a military land warrant had been located on a tract of land, which thereafter, but before the issue of the patent, had been sold by the locator. The act under which the land warrant was issued provided that no claim for military bounty should be assignable or transferable until after the patent had been issued, and that all sales, mortgages, or contracts made prior thereto should be void. It was held that rights under the land warrant vested upon location, that the patent when issued related back to the time of the location, and that the conveyance intermediate the location and patent was valid and carried the title.

In Witherspoon *v.* Duncan (4 Wall., 210, 218) the court held as follows:

In no just sense can lands be said to be public lands after they have been entered at the land office and a certificate of entry obtained. If public lands before entry, after it they are private property. If subject to sale, the government has no power to revoke the entry and withhold the patent. A second sale, if the first was authorized by law, confers no right on the buyer and is a void act. . . . . The contract of purchase is complete when the certificate of entry is executed and delivered, and thereafter the lands cease to be a part of the public domain. The government agrees to make proper conveyance as soon as it can, and in the meantime holds the naked legal fee in trust for the purchaser who has the equitable title.

In Stark *v.* Starrs *et al.* (6 Wall., 402) the plaintiffs below, Starrs *et al.*, claimed title under a patent based upon an act of Congress of May 23, 1844 (5 Stat., 657), known as the town site act, and Stark, the defendant below, claimed under a patent based upon the act of September 27, 1850 (9 Stat., 496), known as the Oregon donation act. The town site patent was issued December 7, 1860, and the patent under the donation act was issued December 8, 1860. The court, in determining the controversy thus presented, said:

We are clear that the town site act of 1844 was not extended to Oregon until the 17th of July, 1854; and even then that it only operated to exclude lands occupied as town sites, or settled upon for purposes of business or trade, from a donation claim, which had not been previously surveyed. Before the passage of this act the claim of the defendant, Stark, had been surveyed, and the required proof of his settlement and continued occupation and residence made, and such steps had been taken as to perfect his right to a patent. The lands embraced by his claim had then ceased to be the subject of purchase from the United States by any person, natural or artificial. The right to a patent once vested is treated by the government, when dealing with the public lands, as equivalent to a patent issued. When, in fact, the patent does issue, it relates back to the inception of the right of the patentee, so far as it may be necessary, to cut off intervening claimants.

In Barney *v.* Dolph (97 U. S., 652, 656) it was said:

When the right to a patent once became vested in a settler under the law, it was equivalent, so far as the government was concerned, to a patent actually issued. We so decided in Stark *v.* Starrs, 6 Wall., 402. The execution and delivery of the patent after the right to it is complete are the mere ministerial acts of the officer charged with that duty. An authorized sale by a settler, therefore, after his right to a patent had been fully secured, was, as to the government, a transfer of the ownership of the land.

In Wirth *v.* Branson (98 U. S., 118, 121) it was held:

The rule is well settled, by a long course of decisions, that when public lands have been surveyed and placed in the market, or otherwise opened to private acquisition, a person who complies with all the requisites necessary to entitle him to a patent in a particular lot or tract is to be regarded as the equitable owner thereof, and the land is no longer open to location. The public faith has become pledged to him, and any subsequent grant of the same land to another party is void, unless the first location or entry be vacated and set aside.

This was laid down as a principle in the case of Lytle *et al. v.* The State of Arkansas *et al.* (9 How. 314), and has ever since been adhered to.

In Simmons *v.* Wagner (101 U. S., 260, 261) the court said:

It is well settled that when lands have once been sold by the United States and the purchase-money paid, the lands sold are segregated from the public domain, and are no longer subject to entry. A subsequent sale and grant of the same lands to another person would be absolutely null and void so long as the first sale continued in force. Wirth *v.* Branson, 98 id., 118; Frisbie *v.* Whitney, 9 Wall., 187; Lytle *v.* The State of Arkansas, 9 How., 314. Where the right to a patent has once become vested in a purchaser of public lands, it is equivalent, so far as the government is concerned, to a patent actually issued. The execution and delivery of the patent after the right to it has become complete are the mere ministerial acts of the officers charged with that duty.

The case of Benson Mining and Smelting Company *v.* Alta Mining and Smelting Company (145 U. S., 428) involved a controversy which arose under the provisions of the mining laws. An application for patent was filed under section 2325 of the Revised Statutes, notice of the application was duly posted and published, and in the absence of any adverse claim filed prior to the expiration of the period of publication, the applicant paid the purchase price for the land and did all which the law required him to do in order to secure a patent for his claim. It was sought to defeat his right to a patent on the ground that he had failed to continue the expenditure of $100 in labor and improvements upon his claim each year after the completion of his patent proceedings, in accordance with the requirement of section 2324 of the Revised Statutes, that—

On each claim located after the tenth day of May, eighteen hundred and seventy-two, and until patent has been issued therefor, not less than one hundred dollars' worth of labor shall be performed or improvements made during each year.

In denying this contention, the court said:

It is a general rule, in respect to the sales of real estate, that when the purchaser has paid the full purchase price his equitable rights are complete, and there is nothing left in the vendor but the naked legal title, which he holds in trust for the purchaser. And this general rule of real estate law has been repeatedly applied by this court to the administration of the affairs of the Land Department of the government; and the rule has been uniform, that whenever, in cash sales, the price has been paid, or, in other cases, all the conditions of entry performed, the full equitable title has passed and only the naked legal title remains in the government in trust for the other party, in whom are vested all the rights and obligations of ownership.

Then, after considering a number of authorities on the subject, most of which have been herein referred to, it was further said:

There is no conflict in the rulings of this court upon the question. With one voice they affirm that when the right to a patent exists, the full equitable title has passed to the purchaser with all the benefits, immunities and burdens of ownership, and that no third party can acquire from the government an interest as against him.

In Deffeback *v.* Hawke (115 U. S., 392, 404), after referring to and discussing certain provisions of the statutes relating to the disposal of lands valuable for minerals, the court said:

It is plain, from this brief statement of the legislation of Congress, that no title from the United States to land known at the time of sale to be valuable for its minerals of

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gold, silver, cinnabar, or copper can be obtained under the pre-emption or homestead laws or the town site laws, or in any other way than as prescribed by the laws specially authorizing the sale of such lands, except in the States of Michigan, Wisconsin, Minnesota, Missouri and Kansas. We say "land *known* at the time to be *valuable* for its minerals," as there are vast tracts of public land in which minerals of different kinds are found, but not in such quantity as to justify expenditures in the effort to extract them. It is not to such lands that the term "mineral" in the sense of the statute is applicable. In the first section of the act of 1866 no designation is given of the character of mineral lands which are free and open to exploration. But in the act of 1872, which repealed that section and re-enacted one of broader import, it is "*valuable* mineral deposits" which are declared to be free and open to exploration and purchase. The same term is carried into the Revised Statutes. It is there enacted that "lands *valuable* for minerals" shall be reserved from sale, except as otherwise expressly directed, and that "*valuable* mineral deposits" in lands belonging to the United States shall be free and open to exploration and purchase. We also say lands *known* at the time of their sale to be thus valuable, in order to avoid any possible conclusion against the validity of titles which may be issued for other kinds of land, in which, years afterwards, rich deposits of mineral may be discovered. It is quite possible that lands settled upon as suitable only for agricultural purposes, entered by the settler and patented by the government under the pre-emption laws, may be found, years after the patent has been issued, to contain valuable minerals. Indeed, this has often happened. We, therefore, use the term *known* to be valuable at the time of sale, to prevent any doubt being cast upon titles to lands afterwards found to be different in their mineral character from what was supposed when the entry of them was made and the patent issued.

In Colorado Coal and Iron Company *v.* United States (123 U. S., 307, 328) it was said:

A change in the conditions occurring subsequently to the sale, whereby new discoveries are made, or by means whereof it may become profitable to work the veins and mines, can not affect the title as it passed at the time of the sale. The question must be determined according to the facts in existence at the time of the sale.

See also Hedrick *v.* Atchinson, etc., R. R. Co. (167 U. S., 673, 679); Widdicombe *v.* Childers (124 U. S., 400).

To the same general effect have been the decisions of the Land Department. In Harnish *v.* Wallace (13 L. D., 108-9) it was held, with respect to an entry made under the pre-emption law, that—

In order to defeat the entry, on the ground of mineral character of the land, it must be shown that mineral was known to exist at the time of the entry, and a discovery of mineral made, as in this case, more than four years after the allowance of the entry, will not warrant its cancellation.

In Rea *et al.* *v.* Stephenson (15 L. D., 37) it appeared that a claimant under the homestead law had submitted his final proofs, showing compliance with all legal requirements, and had made final entry. It was sought to defeat his entry by showing subsequent discoveries of valuable minerals in the land. In passing upon the case, the Department, after referring to a number of authorities on the subject, held:

From these authorities it is evident that the question of the character of the land must be determined, in the case of a homestead entry, as of the date when the final entry is made, and under the conditions then existing.

In the case of Arthur *v.* Earle (21 L. D., 92–3) the Department said:

It is found by the evidence, so far as the allegation that the tracts in question are more valuable for deposits of coal than for agricultural purposes are concerned, that some deposits of coal of no commercial value were discovered on the land by the protestant in August, 1892, after the date of Earle's final entry and the issuance of final certificate to him; that two or three shafts were sunk on said tract, and that small veins of coal were found, which are not shown to have been of any commercial value.

At any rate, the discovery, having been made after the purchase of said land and the issuance of final certificate to Earle, would not defeat the issuance of patent, even though said land should have been shown to be more valuable for coal than for agricultural purposes, as the conditions existing at the date of final entry determine whether the land should be excluded from homestead entry on account of its alleged mineral character.

In Chormicle *v.* Hiller *et al.* (26 L. D., 9, 14) it was held, with respect to an entry made by the defendant, Hiller, under the timber and stone act of June 3, 1878 (20 Stat., 89), that—

Discoveries made subsequent to Hiller's purchase can not be used to defeat his right to the land. The conditions that pertained at the date of entry control, and not what may have been developed since.

In Reid *et al.* *v.* Lavallee *et al.* (26 L. D., 100, 102) it was said:

The only questions, however, properly before the land department in this proceeding are those which relate to the actual known character of the land in controversy at the date of the cash entry No. 269. If the land was then known to be valuable chiefly for its mineral contents it was not subject to such entry. . . . . If the land was agricultural in character when Lavailee made his cash entry therefor, and if he is shown to have possessed the necessary qualifications, and to have fully complied with the homestead law up to that time, his entry must stand.

See also the cases of Aspen Consolidated Mining Co. *v.* Williams (27 L. D., 1, 14–18), and authorities therein cited, and McCormack *v.* Night Hawk and Nightingale Gold Mining Co. (29 L. D., 373).

These established principles, in the opinion of the Department, are applicable to selections under the act of June 4, 1897. The act clearly contemplates an exchange of equivalents. Such is the unmistakable import of its terms. In the case of the relinquishment of patented lands title is to be given by the government for title received. When an unperfected *bona fide* claim is relinquished, the claimant is to be placed in the same situation with respect to the selected tract that he occupied with respect to the tract relinquished. If a complete title is surrendered, the right to a complete title in return is secured. If only an unperfected claim is surrendered, the same rights are secured with respect to the new claim that were possessed with respect to the claim surrendered.

That the administration of the act in question falls within the jurisdiction of the land department there can be no doubt (Bishop of Nesqually *v.* Gibbon, 158 U. S., 155, 167). Selections under the act are therefore subject to examination by the officers of the land depart-

ment until the issuance of patent. This examination is had for the purpose of ascertaining and declaring whether or not the selector, by compliance with all the necessary requisites, has entitled himself to a patent, and not for the purpose of determining whether or not these officers will consent to the selection. If the examination, whether had at the instance of third parties claiming against the selections, or in *ex parte* proceedings, discloses that the selector has fully complied with all the necessary requisites and has honestly and correctly disclosed the title to the land relinquished and the condition and character of the land selected and that the records of the land department disclose no obstacle to the relinquishment or selection, the duty of the land officers is clear; they must patent the land to the selector and they have no discretion to do otherwise. The rights of the selector, however, attach and take effect at the point of time when he has done all that is incumbent upon him to do in the premises and are not postponed to the time when that fact is ascertained and declared by the land officers.

Selections of lieu lands under this act are essentially different from selections of indemnity lands by railroad land grant companies to supply losses in the place limits of their grants. Most, if not all, of the railroad land grants which contain indemnity provisions require that indemnity lands shall be selected by the Secretary of the Interior, or that the selections shall be made under the direction or subject to the approval of that officer. These railroad indemnity selections have none of the elements of an exchange of land for land. The railroad company surrenders no title and the government receives none. Such are not the provisions and effect of the statute here under consideration. The selection is to be made by the owner or claimant who makes the relinquishment, and the only conditions imposed by the statute are that the tract selected shall be "vacant land open to settlement." The contention that the same principles should govern both classes of selections can not be sustained.

It is further contended that the statutory exception of mineral lands from the operation of the homestead law was vitally changed by the act of March 3, 1891 (26 Stat., 1095). By that act the pre-emption law, which contained a provision excepting from entry or sale thereunder certain classes of lands, including "lands on which are situated any known salines or mines," was repealed. This provision had become, by reference (Sec. 2289, R. S.), a part of the homestead law. The act of 1891 also amended the homestead law by striking out all reference to the pre-emption law, and thus eliminated the provision specifically excepting "lands on which are situated any known salines or mines." The contention is that this change in the statute requires the application of a different rule from that which formerly obtained in the matter of fixing the time with respect to

which the character of lands sought to be acquired under the homestead law, is to be determined; that by analogy the different rule should be applied to selections under the act of June 4, 1897, which are to be made of lands open to settlement, the homestead statute being the chief settlement law; that since the repeal of the pre-emption law and the amendment of the homestead law as stated, the only exception of lands on account of their mineral character from settlement and entry under the latter law is that contained in section 2302 of the Revised Statutes, which declares: "Nor shall any mineral lands be liable to entry and settlement under its provisions;" that the words "mineral lands" are of broader significance than the words "lands on which are situated any known salines or mines," and import the actual, rather than the known, character of lands; and that in view thereof, if lands selected under the act of 1897 are shown, at any time before the selections are approved by the land department, to be mineral in character, it will be thus demonstrated that they were in fact mineral lands when selected, and therefore were not subject to selection, though not known at that time to be valuable for minerals.

The Department is not favorably impressed with this contention. The provision in section 2302 excepting mineral lands from disposal under the homestead law was in force prior to the act of March 3 1891, the same as it has been since. The repeal of the pre-emption law and the amendment of the homestead law by that act, did not give to the words of this exception any different meaning or force than they had before. While this section had been a part of the general homestead statute, at least ever since the adoption of the Revised Statutes, the supreme court and the Department, in decisions rendered since that time, have repeatedly and uniformly held, as has already been shown, that to exclude lands from the operation of the homestead law, as well as from the pre-emption and townsite laws, on account of their mineral character, they must be *known* to be valuable for minerals and that if not of *known* mineral character at the time when all necessary requirements have been complied with by the person seeking title under the homestead or other law no subsequent discovery of mineral therein will affect or impair his right or title. These repeated and uniform rulings respecting the operative force of the section in question, must be accepted as a construction thereof contrary to the contention of appellees.

Barden *v.* Northern Pacific Railroad Company (154 U. S., 288), cited and relied on by the appellees, was a very different case from the one here under consideration. That case involved the construction of a grant, in the nature of a donation, of a large amount of lands to a railroad company. "All mineral lands," excepting those containing coal and iron, were expressly excluded from the grant, and a like quantity of non-mineral lands was given in lieu thereof. By a joint

resolution subsequently passed by Congress in relation to that and other similar grants, it was declared that such grants should not be "construed as to embrace mineral lands, which in all cases shall be and are reserved exclusively to the United States." In construing the grant, considering the joint resolution as a part of it; considering also the nature and character of the grant, its great magnitude, the circumstances under which it was made, the fact that other lands were given in like quantity in lieu of mineral lands in the place limits; considering the policy of Congress in making its numerous grants in aid of railroads, which had uniformly been to expressly exclude all mineral lands from them, except coal and iron; and considering the previously established rules governing the interpretation of such grants, the court held that the question as to the mineral or non-mineral character of the lands was an open one up to the time of issuing the patent. Manifestly, the principles announced in that case were intended to be controlling only in the administration of railroad land grants, and other land grants of like nature, which are to be strictly construed against the grantee and in favor of the government. In the course of its opinion the court referred with approval to the case of Leavenworth Railroad Company *v.* United States (92 U. S., 733, 739–40), where it was said:

> The rules which govern in the interpretation of legislative grants are so well settled by this court that they hardly need be reasserted. They apply as well to grants of lands to States, to aid in building railroads, as to grants of special privileges to private corporations. In both cases the legislature, prompted by the supposed wants of the public, confers on others the means of securing an object the accomplishment of which it desires to promote, but declines directly to undertake. . . . . This grant . . was made for the purpose of aiding a work of internal improvement, and does not extend beyond the intent it expresses. . . . . This is to be ascertained from the terms employed, the situation of the parties, and the nature of the grant. If these terms are plain and unambiguous, there can be no difficulty in interpreting them; but, if they admit of different meanings—one of extension, and the other of limitation,—they must be accepted in the sense favorable to the grantor.

In another part of the opinion the court said:

> The grant under consideration is one of a public nature. It covers an immense domain, greater in extent than the area of some of our largest States, and must be strictly construed.

It was not intended by the decision in the Barden case to overrule or in any manner interfere with the principles enunciated in numerous earlier decisions, as we have seen, with respect to purchases and entries made under the laws relating generally to the disposal of the public lands. Those principles still prevail in all their original force and effect, and they have been frequently recognized by the supreme court since the decision in the Barden case. See Hedrick *v.* Atchison, etc., Railroad, *supra*, and Shaw *v.* Kellogg (170 U. S., 312).

Shaw *v.* Kellogg is a case which involved the construction of a statute in many respects similar to the one here under consideration.

By act of June 21, 1860 (12 Stat., 71–2), Congress made provision for the adjustment of a dispute between the claimants under two conflicting Mexican grants to a large body of land in the vicinity of Las Vegas, New Mexico. The claimants under the elder grant had signified their willingness to waive all claim to the land in controversy if permitted to take land elsewhere, and the act gave to them—the heirs of Luis Maria Baca—the right "to select, instead of the land claimed by them, an equal quantity of vacant land, not mineral, in the Territory of New Mexico." The selections were to be made within three years and were to be in square bodies not exceeding five in number. They were made within the time limited. Number 4 of the series authorized was involved in the case referred to. Speaking of the time with respect to which rights under the selection became vested, the court said (pp. 332–3):

> The grantees, the Baca heirs, were authorized to select this body of land. They were not at liberty to select lands already occupied by others. The lands must be vacant. Nor were they at liberty to select lands which were then known to contain mineral. Congress did not intend to grant any mines or mineral lands, but with these exceptions their right of selection was coextensive with the limits of New Mexico. We say "lands then known to contain mineral," for it cannot be that Congress intended that the grant should be rendered nugatory by any future discoveries of mineral. The selection was to be made within three years. The title was then to pass, and it would be an insult to the good faith of Congress to suppose that it did not intend that the title when it passed should pass absolutely, and not contingently upon subsequent discoveries. This is in accord with the general rule as to the transfer of title to the public lands of the United States. In cases of homestead, pre-emption or townsite entries, the law excludes mineral lands, but it was never doubted that the title once passed was free from all conditions of subsequent discoveries of mineral.

The two acts, considering, as must be done, that the exception of "mineral lands" from the operation of the homestead law is a part of the act of 1897, are, in effect, the same, with respect to the matter now under consideration. The supreme court held, in the Shaw-Kellogg case, that lands vacant and "not known to contain mineral" at the time of selection, passed under the act of 1860, whether subsequently discovered to be mineral or not. The same rule should be applied to selections under the act of 1897. It would be strange indeed, if by the latter act, Congress intended that one who, accepting the government's offer of exchange, relinquishes a tract to which he has obtained full title in a forest reservation, and in lieu thereof selects a tract of land which at the time is vacant and open to settlement, and does all that is required of him to complete the selection and to perfect the exchange, should thereby acquire only an inchoate right to the selected tract, liable to be defeated by subsequent discoveries of mineral at any time before patent, or before final action upon the selection by the land department. Such a construction would not only tend to defeat the objects for which the act was passed, by discouraging owners of

lands in forest reservations from giving up their titles, but would be against both the letter and spirit of the act. Parties would be slow indeed to relinquish their complete titles if it were once understood that they could obtain only doubtful or contingent rights in return for them. It could not have been the intention of Congress that parties accepting the government's offer of exchange should be embarrassed by any such conditions of doubt and uncertainty.

The Department accordingly holds:

(1) That where a person making selection under the act of June 4, 1897, has complied with all the terms and conditions necessary to entitle him to a patent to the selected land, he acquires a vested interest therein and is to be regarded as the equitable owner thereof.

(2) That the right to a patent under the act, once vested, is, for most purposes, the equivalent of a patent issued, and when in fact issued, the patent relates back to the time when the right to it became fixed and takes effect as of that date.

(3) That questions respecting the class and character of the selected lands are to be determined by the conditions existing at the time when all requirements necessary to obtaining title have been complied with by the selector, and no change in such conditions, subsequently occurring, can affect his rights.

These principles are in no sense antagonistic to the established doctrine of the jurisdiction and control of the land department over the disposition of the public lands. Undoubtedly such jurisdiction and control exist until patent has been issued. Knight *v.* United States Land Association (142 U. S., 161); Michigan Land and Lumber Co. *v.* Rust (168 U. S., 589); Brown *v.* Hitchcock (173 U. S., 473); Hawley *v.* Diller (178 U. S., 476). This jurisdiction extends to determining the question, whether or not the equitable title has passed; but it has never been held that where such title has once actually vested the land department has the power to destroy it. As said in Michigan Land and Lumber Co. *v.* Rust, *supra:*

> Generally speaking, while the legal title remains in the United States, the grant is in process of administration and the land is subject to the jurisdiction of the land department of the government. It is true a patent is not always necessary for the transfer of the legal title. Sometimes an act of Congress will pass the fee. Strother *v.* Lucas, 12 Pet., 410, 454; Grignon's Lessee *v.* Astor, 2 How., 319; Chouteau *v.* Eckhart, 2 How., 344, 372; Glasgow *v.* Hortiz, 1 Black, 595; Langdeau *v.* Hanes, 21 Wall., 521; Ryan *v.* Carter, 93 U. S., 78. Sometimes a certification of a list of lands to the grantee is declared to be operative to transfer such title, Rev. Stat. 2449; Frasher *v.* O'Connor, 115 U. S., 102; but wherever the granting act specifically provides for the issue of a patent, then the rule is that the legal title remains in the government until the issue of the patent, Bagnell *v.* Broderick, 13 Pet. 436, 450; and while so remaining the grant is in process of administration, and the jurisdiction of the land department is not lost.
>
> . . . . In other words, the power of the department to inquire into the extent and validity of the rights claimed against the government does not cease until the legal title has passed.

See also Cornelius *v.* Kessel (128 U. S., 456); Orchard *v.* Alexander (157 U. S., 372); and Parsons *v.* Venzke (164 U. S., 89). So, too, with respect to selections under the act of 1897. The land department has the jurisdiction and power, at any time before a patent is issued, to institute and carry on, after appropriate notice, such proceedings as may be necessary to enable it to determine whether the selected lands were of the requisite class and character, and whether the selection was in other respects regular and in conformity with the requirements of the act. But the determination, when had, must relate to the time when, if at all, the selector has done all that is required of him in order to perfect his right to a patent.

What are the essential requirements of a statute respecting the selection of the lieu land with which one seeking title thereto must comply? Upon relinquishing to the government the tract in the forest reservation, he must make selection of the tract desired in exchange therefor. The act so expressly declares. But what showing must he make with respect to the selected tract? The statute authorizes selection only of "vacant land open to settlement." To be vacant, the land must not be occupied by others. To be open to settlement, it must not be known to be valuable for minerals, or reserved from settlement for any other reason. In so far as the existing conditions appear from the land office records, that is, whether the selected tract is of lands to which the settlement laws have been extended, and whether the same is free from record appropriation, claim, or reservation, no showing by the selector in respect thereto need be made for the reason that the officers of the government can and must take notice of the public records. But as to conditions the existence or nonexistence of which can not be determined by anything appearing upon the public records and as to which the officers of the government must depend entirely upon outside evidence, that is, whether the selected tract is occupied by others or known to be valuable for minerals, it is manifestly necessary that the required evidence should be furnished by the selector. The officers of the government can not be expected to know whether land selected under the act is vacant and not known to be valuable for minerals, and in these respects subject to selection. Such an expectation would be impossible of realization. For instance, the Visalia land district, in which the lands in controversy are situated, comprises the greater portion of nine counties in California and embraces an area of over seven million acres. Of this area over five hundred thousand acres of unreserved surveyed public land, scattered throughout the district, were undisposed of at the end of the fiscal year during which the selections in question were filed (see annual report of the Commissioner of the General Land Office for the year ended June 30, 1900). In these respects the Visalia district does not greatly differ from many other land districts wherein selections under the act of 1897 have been, or are likely to be, made. Obviously,

therefore, it could not have been contemplated that the local officers of the various land districts should or could, from personal knowledge, determine the physical conditions pertaining to lands selected under said act. The argument is intensified when applied to the Commissioner of the General Land Office and the Secretary of the Interior.

Nor can selections be lawfully accepted until there is a showing that the selected land is vacant and not known to be valuable for minerals. No other lands are subject to selection, and no selection can be regarded as complete until these essential conditions are made to appear. They do not appear from the public surveys. In this case the lands were surveyed in 1854. Whether since that date they have been continuously, or at any time, vacant, or occupied, and whether at any time known to be valuable for minerals, and if so, whether stripped of their minerals and worked out, are matters not shown by the land office records.

The right to a patent is not acquired in any case until the proofs are such that patent could be issued upon them if nothing were shown to the contrary. As long as anything remains undone which it is essential should be done by the selector in order to entitle him to a patent, the right thereto does not vest.

That a non-mineral affidavit should accompany the selection is not seriously questioned by appellant. It is just as essential that it should be accompanied by a vacancy or non-occupancy affidavit. Appellant's contention that the word "vacant," as used in the statute, means public lands which are not shown by the records of the local office or General Land Office to be claimed, appropriated, or reserved, can not be accepted. Portions of the public lands may be occupied, and for that reason be not subject to selection, and yet there be no mention of their occupancy in the records of the land department. It frequently occurs that persons desiring to secure title to lands under the homestead law, settle upon and occupy the same, for months and even years, before placing their claims of record. By the act of May 14, 1880 (21 Stat., 140, Sec. 3), such settlers are given the same time to file their claims and place their entries of record as was originally given to settlers under the pre emption law (Secs. 2264 and 2265, R. S.). But for various causes it frequently occurs that the time is allowed to pass without entry, and the occupancy is continued by the claimants with the hope and expectation of making entry at some future date. And, as was said by the supreme court in Tarpey *v.* Madsen (178 U. S., 215, 221):

> It is a matter of common knowledge that many go on to the public domain, build cabins and establish themselves, temporarily at least, as occupants, but having in view simply prospecting for minerals, hunting, trapping, etc., and with no thought of acquiring title to land. Such occupation is often accompanied by buildings and enclosures for housing and care of stock, and sometimes by cultivation of the soil with a view of providing fresh vegetables. These occupants are not in the eye of the law considered as technically trespassers. No individual can interfere with their occupation, or compel them to leave. Their possessory rights are recognized as of value and made the subjects of barter and sale.

It is thus seen that mere occupancy of the public lands, while creating no right as against the government (Canfield *v.* United States, 167 U. S., 518; Frisbie *v.* Whitney, 9 Wall., 187; Yosemite Valley Case, 15 Wall., 77), is recognized as creating valuable possessory rights in the individual occupants as against all other persons. Unquestionably Congress has the power to protect rights of the character indicated, and it was evidently the intention to furnish such protection as against persons making selection under the act in question; otherwise the word "vacant," as used in the act, would be meaningless. Its use was not necessary to except from selection lands claimed, appropriated or reserved as shown by the land office records. The words "open to settlement" fully and more appropriately exclude lands in that condition. They are not open to settlement. In the Shaw-Kellogg case, *supra*, the supreme court, referring to the words "vacant land," as used in the act of June 21, 1860, held, as we have seen, that the grantees under that act "were not at liberty to select lands already occupied by others." The Department knows of no reason why the same ruling should not be applied to the act of 1897.

The statement of appellant that the land department has never required selections under the act in question to be accompanied by a showing that the selected land is vacant or unoccupied, is not correct. As early as April, 1898, a printed form of application was prescribed by your office and sent to the various local land offices for use in making selections under this act. This form is as follows, the non-occupancy clause being italicized:

4–643. Perfected Claims.

SELECTION IN LIEU OF LAND IN ..... FOREST RESERVE.

(Act June 4, 1897.)

To the REGISTER AND RECEIVER,
United States Land Office,

....

GENTLEMEN: I am the owner of the .....
..... Meridian, containing ..... acres; that said land is situate and lying within the boundaries of the ..... Forest Reserve; that I desire to relinquish and reconvey said land unto the United States, and in lieu thereof to select the .....
..... land district, State of ....., and containing ..... acres, under the provisions of the Act of June 4, 1897 (30 Stat., 36).

In compliance with the regulations under said act I have made, executed, and caused to be recorded in the proper county and State, a deed of reconveyance to the United States of the tract first above described and situate within said ..... Forest Reserve, and in relation thereto have caused a proper abstract of title to be made and authenticated, both of which are herewith submitted.

There are also submitted certificates from the proper officers showing that the land relinquished, or surrendered, is free from encumbrance of any kind; also that all

taxes thereon, to the present time, have been paid; and *an affidavit showing the lands selected to be non-mineral in character and unoccupied.* I therefore ask that United States patent issue to me for the tract or tracts thus selected.

------ -------

Dated, ------ --, -----

The evidence required to accompany the application or selection is here clearly set forth. The selector is required to submit with his application "an affidavit showing the lands selected to be non-mineral in character and unoccupied."

This form of application (4–643) was specifically approved by the Secretary of the Interior in the regulations of May 9, 1899 (28 L. D., 521, 524), and December 18, 1899 (29 L. D., 391, 394). In this respect these regulations have remained unchanged, and they are alike obligatory upon your office, local land offices, and all owners and claimants of lands within the limits of a forest reserve who seek to exchange the same for other lands under said act.

It only remains to apply the stated p nciples and regulations to the selections here in question. In making these selections the selector used a form of application different from the one prescribed. The printed form of affidavit used by him, however, contained both non-mineral and non-occupancy allegations; but the portions of this form of affidavit whereby it was intended to show "that there is no occupation of said land adverse to the selection thereof under the act of June 4, 1897," and "that no portion of said land is claimed for mining purposes under the local customs and rules of miners or otherwise," were stricken out before the affidavits were verified or filed, and the result is that the selections are not accompanied by any showing whatever respecting the state of vacancy or occupancy of the land at the time of selection. For this reason the affidavits were insufficient and the selections imperfect. The proof presented by the selector did not show that the land was subject to selection, and would not justify the issuance of patent even if no protests had been filed. In this connection, it is worthy of mention that about the time of making the selections here in question, this selector made several other selections, under the act of 1897, of lands in the same general locality, and the examination of the files of your office shows that the non-occupancy clause is employed in the accompanying affidavit in some instances and not in others. While the reason for this difference in the proof presented in support of selections under the same act is not apparent upon the face of the selection papers, they bear unmistakable evidence of the fact that the use and rejection, respectively, of the non-occupancy clause were deliberate and not inadvertent.

In view of the admitted present occupancy and known value of the land for mining purposes, as hereinbefore stated, it is apparent that the required proofs can not now be supplied. The selections are accordingly rejected. The order of your office directing a hearing is hereby vacated.

152 Copy of Exhibit U:

EXHIBIT U.

Filed April 16, 1902.

4–643. Perfected claims.

Selection in Lieu of Land in —— Forest Reserve.

(Act June 4, 1897.)

To the register and receiver, United States land office, ——.

GENTLEMEN: I am the owner of the ——, —— meridian, containing*— acres; that said land is situate and lying within the boundaries of the —— forest reserve; that I desire to relinquish and reconvey said land unto the United States, and in lieu thereof to select the ——, —— land district, State of ——, and containing — acres, under the provisions of the act of June 4, 1897 (30 Stat., 36).

In compliance with the regulations under said act I have made, executed, and caused to be recorded in the proper county and State, a deed of reconveyance to the United States of the tract first above described and situate within said —— forest reserve, and in relation thereto have caused a proper abstract of title to be made and authenticated, both of which are herewith submitted.

There are also submitted certificates from the proper officers showing that the land relinquished, or surrendered, is free from encumbrance of any kind; also that all taxes thereon, to the present time, have been paid, and an affidavit showing the lands selected to be non-mineral in character and unoccupied. I therefore ask that a United States patent issue to me for the tract or tracts thus selected.

—— ——.

Dated, —— —, —.

LAND OFFICE AT ——, —— —, 190–.

I, —— ——, register of the land office, do hereby certify that the land above selected, in lieu of the land herein relinquished to the United States, is free from conflict, and that there is no adverse filing, entry, or claim thereto.

—— ——, *Register.*

Selection approved by the Commissioner of the General Land Office, per letter "R" to register and receiver —— —, 190–.

—— ——, *Div.* "*R.*"

[Endorsed:] No. 45,343. At law. Application of —— ——. P. O. address, ——. To select the ——, situated in ——, district —, in lieu of the ——, situated in ——, district ——, under act June 4, 1897 (30 Stat., 36). Selection approved by Commissioner General Land Office —— —, 190–. Approved for patenting —— —, —. —— ——, division "R." Patented —— —, —. Vol. —, page —.

153 EXHIBIT V.

Filed April 16, 1902.

Before the Department of the Interior.

KERN OIL COMPANY ET AL.
vs.
C. W. CLARKE. } 45343.

Involving Visalia, California, forest lieu selections Nos. 1772 and 1774.

Motion for Review.

Comes now C. W. Clarke, by his attorneys, Shirley C. Ward, Jefferson Chandler, Dudley and Michener, M. A. Ballinger, and Horace F. Clarke, and moves the honorable Secretary of the Interior to review and modify his decision of April 25, 1901, and for cause specifies the following errors, to wit:

1. In using the terms "vacant" and "unoccupied" as equivalent or synonymous, showing in such confusion of terms a confusion of ideas, leading to an erroneous conclusion of law upon the facts.

2. In holding that the department had any power to make any regulation whatever requiring a vacancy or other affidavit to be filed as a condition precedent to the selector's rights becoming vested at the time of selection.

3. In holding that the department had any right to make a regulation requiring a vacancy affidavit.

4. In holding that the department did, before the selection in this case, make any regulation requiring a vacancy affidavit, to be filed at time of selection.

154 5. In holding that the word "vacant" in the act in question meant and was synonymous with "unoccupied."

6. In holding that the department had the power to require an affidavit that the land was unoccupied.

7. In holding that the department had, prior to said selection, made a regulation requiring an affidavit that the land was unoccupied, to be filed at the time of the selection.

8. In holding that any affidavit of any kind was necessary under the law, or any regulation made in pursuance thereof, as a condition precedent to the equitable title to the selected land becoming vested in the selector.

9. In holding that the land owned by the Government of the United States, and shown by the report of the surveyor general, to have been vacant and unoccupied, did not remain so, *prima facia*, until the selection, unless the land records of the United States showed some acquisition or occupation under law changing this condition.

10. In holding that any public land which had ever been vacant, did not remain so, *prima facia*, until the same was entered and possession thereof taken by virtue of some law of the United States. All the public domain was once vacant, and once vacant, with title

resting in the United States, it is still vacant, unless that vacancy has been changed by virtue of and under some law of Congress, and that former character is, in the absence of proof to the contrary, legally presumed to exist at this time.

155 11. In holding that the *prima facia* case of vacancy thus established by the report of the surveyor general, was insufficient in the absence of a vacancy affidavit to justify the issuance of a patent in the absence of any protest or claim by any other party.

12. In holding that a *prima facia* case of vacancy must be supported by affidavit of vacancy in order to justify issuance of patent.

13. In holding that any regulation requiring such affidavit was reasonable and justified.

14. In holding that any such regulation did not take from the selector, rights given to him by Congress.

15. In holding that any such regulation did not impose upon the selector, obligations not created by the act of Congress.

16. In holding that any equitable title would vest, if it vested at all, by reason of any affidavit of vacancy, when it fact titles vest, if it vests at all, because of the fact of vacancy at the time of selection.

17. In holding that the *prima facia* vacancy, which is presumed by law, must be supported by proof thereof, before patent could issue, even in the absence of adverse claim.

18. In holding that proof of vacancy must be filed at the time of selection, instead of at the time of a hearing, if proof be necessary at any time.

19. In holding that the last clause but one of the circular of December 18, 1899, required the use of forms 4–643 and 4–634.

156 20. In holding that if said forms were required, that they were legally required.

21. In holding that any regulation made by the department under this law, could in any sense be binding upon the selector.

22. In holding that any regulation made or sought to be made, could in any manner affect the selector, and was for any other purpose than to regulate the acts of the officers and employees of the department.

23. In holding that any regulation could be made by the department that could require any affidavit found in form 4–634.

24. In holding that selector was bound to make any proof of character of land, as a condition precedent to exchange of lands, when in fact the tender of exchange was made by the Government and was simply accepted by the selector. The Government making the offer of its land was bound to know the character thereof, and if, after acceptance, it did not know the same, then it was the duty of the Government, by its officers, to find out, and if its investigation caused it to believe the land not to be of the character named in the offer, then a hearing should be ordered before the register and receiver to determine the question.

25. In holding that the department can require any proof by the selector as to character of land, unless the act of Congress in specific terms so provided.

26. In holding that the selector must file an affidavit of vacancy

at the time of selection, basing that holding on the circular
157 letter of December, 1899.

27. In holding that the lack of satisfactory proof in support of any selection, entry or claim may not be remedied at any time by the filing of such proof, in the absence of any protest based upon the lack of such proof, or in the absence of any legal adverse claim or right predicated upon the lack of such proof.

28. In not holding that the failure of claimant in this case to submit a non-occupancy affidavit may be remedied by filing such affidavit *nunc pro tunc*.

29. In not ordering a hearing to determine the question of occupancy or non-occupancy, if the department is not satisfied with the record showing upon this point.

30. In holding that the department had power to make a regulation requiring a vacancy affidavit, without therein fixing a future date for it to take effect, when theretofore it had never been the custom of the Land Department to require a vacancy affidavit with any applications for, or acquisition of, lands, under the act of June 4, 1897, and when in fact such affidavit was not and had not theretofore been required in or with applications under any law.

31. In holding that the department had the right or power to make a regulation requiring affidavits to be filed at time of selection, when in fact no such right has ever been given to the department by the act of June 4, 1897, or by any other act of Congress.

32. In holding that the circular of December 18, 1899, issued by the Commissioner of the General Land Office and ap-
158 proved by the Secretary of the Interior, was intended by said Commissioner to require, or did in fact require, an affidavit of vacancy, when this is conclusively shown by the records of the General Land Office, wherein is shown the continued, unchanged, and uninterrupted course of the Land Commissioner, in the execution of the act of June 4, 1897, wherein it has been the uniform holding of said Commissioner, that such an affidavit was not required, and wherein it has been the rule of said Commissioner to approve selections under said act, and cause patents to issue where no such affidavit has been filed by the selector.

33. In holding that an affidavit of vacancy is a necessity when the department, by its general circular of July 11, 1899, page one, notified the public that "Any proper information regarding vacant public lands may be obtained by application at any of the land offices."

34. In holding that the Government, having proposed an exchange of property and held out to the selector certain lands represented by it to be of the class it offers, has any right to require the acceptor (selector) to find out and prove to the Government whether or not its own statements and representations are true. If the Government thinks it has made a mistake, it may of course correct it, but not until this mistake is alleged and then after fair trial; especially so when the full purchase price has been required and paid in
159 advance, in good faith and in compliance with the practice of the department in such cases. The Government is estopped

from enforcing an existing rule, even though a legal one, when by its practice it ignores such rule and sets it at naught, continuously. It has no right to make a rule and hold it up to be brought down on "D" to his destruction and ruin, when "D" has done all that "A," "B," and "C" have done, and when he has seen "A," "B" and "C" go unpunished and in fact rewarded for their course and conduct. It may be that it has been the weakness, carelessness, indifference, or incompetence of the subordinate branch of the department, but this cannot relieve the department of its responsibility. There is today a law of this district punishing certain minor offenses by punching holes in the ears, and some localities still have laws punishing a man for kissing his *own* wife in public. These laws have been ignored, and though still on the books, it would cause indignation throughout the entire world were such laws enforced, and yet it would be just as reasonable for a judge to say it is the law and then enforce it, as to hold us to a rule made, not by Congress, but by the department alone, which rule from its first making until now, has been wholly ignored by every officer of the Government. Its disuse has destroyed any life its promulgation could ever have given to it.

DUDLEY & MICHENER,
JEFFERSON CHANDLER,
HORACE F. CLARK,
S. C. WARD,
JNO. M. THURSTON,
M. A. BALLINGER,
Attorneys for Clarke.

160 I, M. A. Ballinger, on my oath say that the foregoing motion is made in good faith and not for the purpose of delay.

M. A. BALLINGER.

Subscribed and sworn to before me this May 25th, 1901.

E. CATESBY ROWZEE,
Notary Public.

161 EXHIBIT W.

Filed April 16, 1902.

45343.

Affidavit of Non-occupancy in Support of Selection Made by C. W. Clarke under Act of June 4, 1897.

STATE OF CALIFORNIA, } ss:
City and County of San Francisco, }

A. Barion being duly sworn according to law, deposes and says: That he is over the age of twenty-one years, a citizen of the United States and of the State of California. That he was upon the 14th day of December, 1899, well acquainted with the character and condition of the following-described land, and with each and every legal subdivision thereof, to wit: the north half (N. ½) of the southeast quarter (S. E. ¼) of section four (4), township twenty-nine (29) south, range twenty-eight (28) east, Mount Diablo base and meridian, in Kern county, California.

That said land was upon such date unoccupied, and that there was not then any occupation thereof adverse to the selection thereof under the act of June 4, 1897, made upon such date by C. W. Clarke. That affiant has frequently passed over said land, and his personal knowledge thereof is such as to enable him to testify understandingly in regard thereto. That the foregoing statements apply to each and every legal subdivision thereof. That affiant's post-office address is 936 Bryant St., San Francisco, Cal.

A. BARION.

162 Subscribed and sworn to before me this 29 day of May, 1901.

THOMAS S. BURNES,

[SEAL.] *Notary Public in and for the City and County of San Francisco, State of California.*

EXHIBIT X.

Filed April 16, 1902.

45343.

Affidavit of Non-occupancy in Support of Selection Made by C. W. Clarke under Act of June 4, 1897.

STATE OF CALIFORNIA, } *ss:*
City and County of San Francisco, }

A. Barion being duly sworn according to law, deposes and says: That he is over the age of twenty-one years, a citizen of the United States and of the State of California. That he was upon the 14th day of December 1899, well acquainted with the character and condition of the following-described land, and with each and every legal subdivision thereof, to wit: the south half (S. ½) of the north-east quarter (N. E. ¼) of section four (4), township twenty-nine (29) south, range twenty-eight (28) east, Mount Diablo base and meridian, in Kern county, California.

That said land was upon such date unoccupied, and that
163 there was not then any occupation thereof adverse to the selection thereof under the act of June 4, 1897, made such date by C. W. Clarke. That affiant has frequently passed over said land, and his personal knowledge thereof is such as to enable him to testify understandingly in regard thereto. That the foregoing statements apply to each and every legal subdivision thereof. That affiant's post-office address is 936 Bryant St., San Francisco, Cal.

A. BARION.

Subscribed and sworn to before me this 29 day of May, 1901.

THOMAS S. BURNES,

[SEAL.] *Notary Public in and for the City and County of San Francisco, State of California.*

EXHIBIT "Y."

Filed April 16, 1902.

The Department is accordingly of the opinion that where deputies are duly empowered by congressional, State, or territorial laws to perform the duties of clerks of courts of record, the affidavits, proofs, and oaths named in the act of March 11, 1902, may be made before such deputies with like effect as though made before their principals.

ALLEN LAUGHLIN.

Motion for review of departmental decision of February 25, 1902, 31 L. D., 256, denied by Secretary Hitchcock April 12, 1902.

LIEU SELECTIONS UNDER THE ACT OF JUNE 4, 1897.

KERN OIL CO. ET AL. *v.* CLARKE (ON REVIEW).

The word "vacant" in the act of June 4, 1897, as in part descriptive of land thereby made subject to selection in lieu of land situated in a public forest reservation and relinquished to the government, is used in its primary or ordinary sense of *unoccupied*, and not in a special, restricted, or technical sense, intended only to describe land "not taken or appropriated of record."

The land department has authority to make such rules and regulations, not inconsistent with law, as may be necessary or appropriate to secure the effective and convenient administration of any law which falls within its jurisdiction.

Wherever, by act of Congress, provision is made for the disposal of portions of the public lands of a designated class and character, selection or entry thereof under such act can not lawfully be permitted until the lands sought to be acquired under said act are shown to be of the class and character subject to disposal thereunder. When the evidence to enable such determination to be made does not appear from the land office records, it must be furnished by those who seek title under the act.

Under proceedings in the land department to acquire title to public land, no rights in the land are to be regarded as having become vested in the party seeking title until he shall have performed all the conditions and fulfilled all the requirements necessary to establish his right to a patent.

The action of the local land officers upon questions of law or fact respecting the disposal of the public lands does not conclude their superior officers or the government. Such action is, in all cases, reviewable by the Commissioner of the General Land Office and by the Secretary of the Interior as the proper administration of the law or the demands of justice may require.

Secretary Hitchcock to the Commissioner of the General Land Office,
(W. V. D.) *April 12, 1902.* (A. B. P.)

This case is again before the Department on C. W. Clarke's motion for review of the decision of April 25, 1901 (30 L. D., 550), wherein certain forest reserve lieu land selections, filed by Clarke December 14, 1899, embracing the N. ½ of the SE. ¼ and the S. ½ of the NE. ¼ of Sec. 4, T. 29 S., R. 28 E., M. D. M., Visalia land district, California, were rejected.

The selections were filed under the act of Congress of June 4, 1897 (30 Stat., 11, 36), wherein, among other things, it was provided—

That in cases in which a tract covered by an unperfected *bona fide* claim or by a patent is included within the limits of a public forest reservation, the settler or owner thereof may, if he desires to do so, relinquish the tract to the government, and may select in lieu thereof a tract of vacant land open to settlement not exceeding in area the tract covered by his claim or patent; and no charge shall be made in such cases for making the entry of record or issuing the patent to cover the tract selected: *Provided further*, That in cases of unperfected claims the requirements of the law respecting settlement, residence, improvements, and so forth, are complied with on the new claims, credit being allowed for the time spent on the relinquished claims.

To this provision certain amendments were made by an act approved June 6, 1900 (31 Stat., 588, 614), but the amendments are not applicable to these selections.

In the course of the decision under review, the Department said (pp. 555–6):

The act in question contains an offer by the government to exchange any of its lands that are vacant and open to settlement for a like quantity of lands, within a forest reservation, for which a patent has been issued, or to which an unperfected *bona fide* claim has been acquired. If he desires to accept the offered exchange, the owner or claimant of the tract in the forest reservation can relinquish the same to the government and select a tract of public land of like quantity in lieu of the tract relinquished. He is to make the selection, and in doing so he is confined to lands which are both vacant and open to settlement. They must not be occupied by others, nor reserved from settlement on account of their known mineral character or otherwise. With these exceptions the field for selection, except when otherwise specially provided, is co-extensive with the limits of the public domain. Further restrictions are imposed by the amendment of June 6, 1900, but they are not applicable to this case.

When do rights under the selection become vested? In the disposition of the public lands of the United States, under the laws relating thereto, it is settled law: (1) That when a party has complied with all the terms and conditions necessary to the securing of title to a particular tract of land, he acquires a vested interest therein, is regarded as the equitable owner thereof, and thereafter the government holds the legal title in trust for him; (2) that the right to a patent once vested, is, for most purposes, equivalent to a patent issued, and when in fact issued, the patent relates back to the time when the right to it became fixed; and (3) that the conditions with respect to the state or character of the land, as they exist at the time when all the necessary requirements have been complied with by a person seeking title, determine the question whether the land is subject to sale or other disposal, and no change in such conditions, subsequently occurring, can impair or in any manner affect his rights.

In support of the propositions stated a number of authorities were cited and applied, and in view thereof it was held (p. 560):

These established principles, in the opinion of the Department, are applicable to selections under the act of June 4, 1897. The act clearly contemplates an exchange of equivalents. Such is the unmistakable import of its terms. In the case of the relinquishment of patented lands title is to be given by the government for title received. When an unperfected *bona fide* claim is relinquished, the claimant is to be placed in the same situation with respect to the selected tract that he occupied with respect to the tract relinquished. If a complete title is surrendered, the right to a

complete title in return is secured. If only an unperfected claim is surrendered, the same rights are secured with respect to the new claim that were possessed with respect to the claim surrendered.

After having considered and answered certain contentions by those claiming against the selections, the Department finally summed up its conclusions upon the question as to the time and manner of the vesting of rights under selections based upon said act, as follows (p. 565):

(1) That where a person making selection under the act of June 4, 1897, has complied with all the terms and conditions necessary to entitle him to a patent to the selected land, he acquires a vested interest therein and is to be regarded as the equitable owner thereof.

(2) That the right to a patent under the act, once vested, is, for most purposes, the equivalent of a patent issued, and when in fact issued, the patent relates back to the time when the right to it became fixed and takes effect as of that date.

(3) That questions respecting the class and character of the selected lands are to be determined by the conditions existing at the time when all requirements necessary to obtaining title have been complied with by the selector, and no change in such conditions, subsequently occurring, can affect his rights.

It was further said and held in said decision:

What are the essential requirements of the statute respecting the selection of the lieu land with which one seeking title thereto must comply? Upon relinquishing to the government the tract in the forest reservation, he must make selection of the tract desired in exchange therefor. The act so expressly declares. But what showing must he make with respect to the selected tract? The statute authorizes selection only of "vacant land open to settlement." To be vacant, the land must not be occupied by others. To be open to settlement, it must not be known to be valuable for minerals, or reserved from settlement for any other reason. In so far as the existing conditions appear from the land office records, that is, whether the selected tract is of lands to which the settlement laws have been extended, and whether the same is free from record appropriation, claim, or reservation, no showing by the selector in respect thereto need be made for the reason that the officers of the government can and must take notice of the public records. But as to conditions the existence or non-existence of which can not be determined by anything appearing upon the public records and as to which the officers of the government must depend entirely upon outside evidence, that is, whether the selected tract is occupied by others or known to be valuable for minerals, it is manifestly necessary that the required evidence should be furnished by the selector. The officers of the government can not be expected to know whether land selected under the act is vacant and not known to be valuable for minerals, and in these respects subject to selection. . . .

Nor can selections be lawfully accepted until there is a showing that the selected land is vacant and not known to be valuable for minerals. No other lands are subject to selection, and no selection can be regarded as complete until these essential conditions are made to appear. They do not appear from the public surveys. In this case the lands were surveyed in 1854. Whether since that date they have been continuously, or at any time, vacant, or occupied, and whether at any time known to be valuable for minerals, and if so, whether stripped of their minerals and worked out, are matters not shown by the land office records.

The right to a patent is not acquired in any case until the proofs are such that patent could be issued upon them if nothing were shown to the contrary. As long as anything remains undone which it is essential should be done by the selector in order to entitle him to a patent, the right thereto does not vest.

That a non-mineral affidavit should accompany the selection is not seriously questioned by appellant. It is just as essential that it should be accompanied by a vacancy or non-occupancy affidavit. Appellant's contention that the word "vacant," as used in the statute, means public lands which are not shown by the records of the local office or General Land Office to be claimed, appropriated, or reserved, can not be accepted. Portions of the public lands may be occupied, and for that reason be not subject to selection, and yet there be no mention of their occupancy in the records of the land department. It frequently occurs that persons desiring to secure title to lands under the homestead law, settle upon and occupy the same, for months and even years, before placing their claims of record. By the act of May 14, 1880 (21 Stat., 140, Sec. 3), such settlers are given the same time to file their claims and place their entries of record as was originally given to settlers under the pre-emption law (Secs. 2264 and 2265, R. S.). But for various causes it frequently occurs that the time is allowed to pass without entry, and the occupancy is continued by the claimants with the hope and expectation of making entry at some future date. And, as was said by the supreme court in Tarpey *v.* Madsen (178 U. S., 215, 221):

"It is a matter of common knowledge that many go on to the public domain, build cabins and establish themselves, temporarily at least, as occupants, but having in view simply prospecting for minerals, hunting, trapping, etc., and with no thought of acquiring title to land. Such occupation is often accompanied by buildings and enclosures for housing and care of stock, and sometimes by cultivation of the soil with a view of providing fresh vegetables. These occupants are not in the eye of the law considered as technically trespassers. No individual can interfere with their occupation, or compel them to leave. Their possessory rights are recognized as of value and made the subjects of barter and sale."

It is thus seen that mere occupancy of the public lands, while creating no right as against the government (Camfield *v.* United States, 167 U. S., 518; Frisbie *v.* Whitney, 9 Wall., 187; Yosemite Valley Case, 15 Wall., 77), is recognized as creating valuable possessory rights in the individual occupants as against all other persons. Unquestionably Congress has the power to protect rights of the character indicated, and it was evidently the intention to furnish such protection as against persons making selection under the act in question; otherwise the word "vacant," as used in the act, would be meaningless. Its use was not necessary to except from selection lands claimed, appropriated or reserved as shown by the land office records. The words "open to settlement" fully and more appropriately exclude lands in that condition. They are not open to settlement. In the Shaw-Kellogg case, *supra*, the supreme court, referring to the words "vacant land," as used in the act of June 21, 1860, held, as we have seen, that the grantees under that act "were not at liberty to select lands already occupied by others." The Department knows of no reason why the same ruling should not be applied to the act of 1897.

It was found that the printed form of affidavit used by Clarke in making the selections in question, while in some respects different from the form prescribed by the departmental regulations, contained both non-mineral and non-occupancy averments; that the non-occupancy averments had been stricken out before the affidavits were verified or filed, and the result thereof was that the selections were not accompanied by any showing whatever respecting the state of vacancy or occupancy of the land at the time of selection. For this reason the affidavits were held to be insufficient and the selections to be imperfect.

The existing occupancy and known value of the land for mining purposes having been admitted at the argument and by the record, it

was further held, in view of such admission, that the required proofs could not then be supplied, and the selections were accordingly rejected.

No exception is taken in the motion for review to the holding of the former decision as to the time when the selector's rights become vested, if at all; or as to the time with respect to which, by the conditions then existing, the class and character of the selected land are to be determined; or as to the effect of the vesting of rights under selections and the issuance of patents for the selected land. The errors assigned as to other parts of the decision are, briefly stated, as follows:

1. In defining the words "vacant land," used in the act of June 4, 1897, to mean *unoccupied* land, and in holding that land, to be subject to selection under the act, must not be occupied by others.

2. In holding that proof of the vacancy or non-occupancy of the land at the time of selection must be furnished by the selector, and that such proof can not be furnished, after the selection has been filed, to take effect as of the date of such filing, when in the mean time the selected land has come to be occupied by others who have, by discovery and development work, demonstrated that it is valuable mineral land.

On application by Clarke, oral argument upon the questions presented by the motion for review was granted, and notice thereof given to all parties interested. Counsel on both sides participated in the oral argument, and also filed lengthy and exhaustive printed briefs in support of their respective contentions.

It is a familiar rule of construction that the words of a statute are to be read and understood in their primary or ordinary sense, and according to their usual import and common acceptation, unless to so construe them would be clearly repugnant to the legislative intention, or would lead to manifestly incongruous or absurd results. (Sutherland on Statutory Construction, Sec. 248; Sedgwick on Construction of Statutory and Constitutional Law, pp. 219–20; Potter's Dwarris, p. 203; Black on Interpretation of Laws, pp. 125 *et seq.*)

In its primary or ordinary sense, *vacant* means empty; unfilled, unoccupied; as a *vacant* or empty box; a *vacant* or unfilled office; a *vacant* or unoccupied house or lot.

It is contended, however, that the word *vacant*, as used with respect to the public lands, had, prior to the act of June 4, 1897, by executive, legislative, and judicial construction, acquired a special, restricted, and technical meaning, the equivalent of "not taken or appropriated of record," and was so used in said act, and not in the sense of *unoccupied*, as held in the decision under review.

Counsel have referred to portions of the annual reports of the Commissioner of the General Land Office, to certain regulations and decisions of the land department, and to acts of Congress and judicial decisions, in all of which the word *vacant* was employed prior to the

passage of the act of 1897. These have all been carefully examined. In some of them the word appears to have been used in its primary or ordinary sense. In others it has been used in the special or restricted sense contended for. In still others, it seems to have been used in both the primary and special senses; that is, as intended to embrace lands neither occupied nor appropriated of record. In some it is not clear in what sense the word is used, whether in its primary, special, or double meaning.

It is not true, as contended, that it has been uniformly used by the supreme court in the sense of "not taken or appropriated of record." This is shown by the following cases:

In Atherton *v.* Fowler (96 U. S., 513, 518–9), decided at October term, 1877, the court, speaking of a controversy which arose under the pre-emption law, said:

> Among the things which the law required of a pre-emptor, and the principal things required of him to secure his right, were: 1. To make a settlement on the land in person. 2. To inhabit and improve the same. 3. To erect a dwelling-house thereon. Sect. 2259, Rev. Stat.
>
> At the moment the land on which the hay in this case was cut became liable to pre-emption, the whole of it was, by the various persons claiming under Vallejo, 1, settled on by them in person; 2, inhabited and improved by them; and, 3, it had dwellings erected on it by them.
>
> Unless some reason is shown, not found in this record, these were the persons entitled to make pre-emption, and no one else. But suppose they were not. Does the policy of the pre-emption law authorize a stranger to thrust these men out of their houses, seize their improvements, and settle exactly where they were settled, and by these acts acquire the initiatory right of pre-emption? The generosity by which Congress gave the settler the right of pre-emption was not intended to give him the benefit of another man's labor, and authorize him to turn that man and his family out of their home. It did not purpose to give its bounty to settlements obtained by violence at the expense of others. The right to make a settlement was to be exercised on unsettled land; to make improvements on unimproved land. To erect a dwelling-house did not mean to seize some other man's dwelling. It had reference to vacant land, to unimproved land; and it would have shocked the moral sense of the men who passed these laws, if they had supposed that they had extended an invitation to the pioneer population to acquire inchoate rights to the public lands by trespass, by violence, by robbery, by acts leading to homicides, and other crimes of less moral turpitude.

In Hosmer *v.* Wallace (97 U. S., 575, 579–80), decided at October term, 1878, the court said:

> To create a right of pre-emption there must be settlement, inhabitation, and improvement by the pre-emptor, conditions which cannot be met when the land is in the occupation of another. Settlement, inhabitation, and improvement of one piece of land can confer no rights to another adjacent to it, which at the commencement of the settlement is in the possession and use of others, though upon a subsequent survey by the government it prove to be part of the same sectional subdivision. Under the pre-emption laws, as held in Atherton *v.* Fowler (96 U. S., 513), the right to make a settlement is to be exercised on unsettled land; the right to make improvements is to be exercised on unimproved land; and the right to erect a dwelling-house is to be exercised on vacant land; none of these things can be done on land when it is occupied and used by others.

The word *vacant* was clearly used by the court, in these cases, in the sense of *unoccupied* and not in the sense of "not taken or appropriated of record." It has not been shown, and can not be, that, prior to June 4, 1897, the word, as applied to the public lands, had acquired an exclusive, special or restricted, and technical meaning, the equivalent of "not taken or appropriated of record." Under established rules of construction, the word, in the act of 1897, must be given its primary or ordinary meaning, unless the subject matter or language of the act clearly shows that it was intended to be understood as referring only to the status of land as shown by the land office records, or unless to give to it its primary or ordinary meaning would lead to incongruous or absurd results.

There is nothing in the language of the act or in the nature of the subject to which it relates to show that the word "vacant" was used necessarily and exclusively to describe lands "not taken or appropriated of record." On the contrary, as stated in the decision under review, the use of this word was not necessary to except from selection lands claimed, appropriated, or reserved as shown by the land office records. The words "open to settlement" fully and more appropriately exclude lands in that condition. Nor can there be any reasonable objection to the construction of the word in its primary or ordinary sense of unoccupied, on the ground that such construction might lead to incongruous or absurd results.

The chief purpose of the act of 1897 was to provide a means whereby the government might acquire the title and control of lands covered by private ownership or claim within the limits of forest reservations, with the view to promoting the objects for which the reservations were established, and whereby the owners or claimants of such lands might obtain in exchange therefor other lands outside the reservations, with the view to relieving themselves of the disadvantages resulting from the withdrawal from settlement and other disposition of the public lands surrounding them. It was provided that lands so held might be exchanged for an equal quantity of "vacant land open to settlement" outside the reservations. The owners or claimants of lands within a forest reservation, if they desired to avail themselves of the proffered exchange, were required to relinquish to the government the lands so owned or claimed by them, and they were to make selection of the lands to be taken in exchange. Except where otherwise specially provided, and subject to the conditions that only lands vacant and open to settlement could be taken, it was the purpose to permit the selections to be made anywhere within the limits of the public domain. With this vast area from which to make selections, it can not reasonably be claimed that a construction of the word "vacant" such as is contended for in the motion for review is necessary to the

effective operation of the statute, or to the accomplishment of the objects for which it was enacted.

Congress had the unquestioned power to restrict the right of selection as it chose, and could so legislate as to avoid bringing a new and probably numerous class of applicants for public lands into antagonism with settlers upon and occupants of the public lands, who were there at the invitation or by the license of the government, and whose settlement or occupancy was not shown upon the land office records. There are many instances in public-land legislation where, in providing a new mode of disposing of public lands, Congress has been careful to avoid contests between individuals and to prevent claimants under the new law from disturbing the possessory rights or imperfect claims of others. In providing a field for selection embracing large portions of twenty-three States and two Territories (Arizona and New Mexico), as is done in the act of 1897, a purpose on the part of Congress to restrict selectors under that act to lands which are not occupied but are vacant is not at all strange or unreasonable. The words of the statute, in their primary or ordinary sense, are plainly expressive of an intention to make this restriction, and to refuse to give effect to the intention thus expressed would be violative of settled and important rules of statutory construction and not permissible.

The act of Congress of February 25, 1885 (23 Stat., 321), is referred to. By that act inclosures of the public lands by any person, association, or corporation, not based upon a claim or color of title made or acquired in good faith, or upon any claim of right asserted in good faith with the view to entry under the general land laws, and the exclusive use and occupancy of any of the public lands, without claim, color of title, or asserted right of entry, as aforesaid, were declared to be unlawful and prohibited. It is urged that Congress could not have intended the word "vacant," in the act of 1897, to be understood in its primary or ordinary sense of unoccupied, for, it is said, that would have been equivalent to recognizing as lawful a thing declared to be unlawful by the act of 1885.

The conditions which led to the passage of the act of 1885, and the evil intended to be corrected, are, in a measure, disclosed by the report made by the Public Lands Committee of the United States Senate, when the bill was pending before that body, where it was said:

> The necessity of additional legislation to protect the public domain because of illegal fencing is becoming every day more apparent. Without the least authority, and in open and bold defiance of the rights of the government, large, and oftentimes foreign, corporations deliberately inclose by fences areas of hundreds of thousands of acres, closing the avenues of travel and preventing the occupancy by those seeking homes. While those fencing allege the lands within such enclosures are open to settlement, yet no humble settler, with scarce the means for the necessaries of life, would presume to enter any such inclosure to seek a home.

A construction of the act of 1897 which would give to it a meaning different from that flowing from the ordinary and natural import of its language, is not required in order that the two acts may stand together and full force and effect be given to each. The meaning accorded to the word "vacant" in the act of 1897 by the decision under review does not operate to impair the effectiveness of the act of 1885. It produces no incongruity in the two acts.

In any event, the full scope and effect of the act of 1885, as bearing upon that of 1897, is not a matter that need be now determined, for the case here under consideration is not one wherein the proofs accompanying the selection are to the effect that there was no occupancy of the land other than one shown to be violative of the act of 1885 or otherwise unlawful. It will be sufficient to consider the question arising upon such a state of facts when a case is presented embodying them. Here the selector presented no proof whatever respecting the condition of the selected land, that is, whether occupied or unoccupied, and if occupied, whether lawfully so or not. Nor do the papers presented by the protestants assist the selector in this matter, because so far as they make any suggestion respecting the condition of the lands in controversy at the time of their attempted selection it is to the effect that they were occupied for the purpose and in the course of mining exploration and work, which were being conducted with a view to the development and utilization of deposits of mineral oil believed to exist therein; and as indicating that this occupancy was in good faith and within the protection of the mining laws, it appears, by admission of the parties, that this mining exploration and work resulted in the production of petroleum oil in large and valuable quantities, giving to the land an unquestioned mineral character.

It is insisted that this Department has held the word "vacant," in the act of 1897, to have no reference to the physical status of the land authorized by the act to be selected; that such was the ruling at the time the selections here in question were filed; and that in the decision under review a change of ruling was made, to the prejudice of rights acquired by this selector under the former ruling. The case of F. A. Hyde, decided April 14, 1899 (28 L. D., 284), is cited. An examination of that case shows that the principal issue was whether unsurveyed as well as surveyed lands could be selected under the act of 1897. On that question the Department stated and held as follows:

> It is to be observed that the words "surveyed" or "unsurveyed" do not anywhere appear in the provision of the statute hereinbefore set out, nor is there any language therein which indicates an intention to limit the selection of lieu land under the said provision to surveyed lands. The only limitation as to kind or condition of the lands subject to lieu selection thereunder is contained in the words "vacant land open to settlement." This language is so clear and explicit as to leave no room for construction. "Vacant land open to settlement" is any public land to which rights may be initiated by settlement, under existing laws. Unsur-

veyed, as well as surveyed, lands for many years past have been and still continue to be open to settlement. It was entirely competent for Congress to limit such selections to surveyed lands, or to extend them to both surveyed and unsurveyed lands, and the words "vacant land open to settlement" including as they do unsurveyed as well as surveyed lands, must be given their proper legal effect. It follows that lieu selections, under the said provision, are not confined to surveyed lands, but may also be made of unsurveyed lands.

It is perfectly clear, from the language quoted, that what the Department decided was that the words "vacant land open to settlement," in their proper legal effect, include unsurveyed as well as surveyed lands, and that, therefore, selections under the act could not be confined to surveyed lands, but might embrace unsurveyed lands as well. No question as to the interpretation of the word "vacant" separately from the words "open to settlement" was considered. No such question was involved in the case. The issue raised with respect to the words "vacant land open to settlement" was, whether they embraced unsurveyed lands, and that only. It was held they did. That holding was not based upon the word "vacant," but upon the words "open to settlement," and this the decision plainly shows. The case does not justify the position assumed by counsel with respect to it.

The ruling of the Department in the case of Baca Float No. 3, decided July 25, 1899 (29 L. D., 44), also prior to the filing of these selections, is important to be observed in this connection. That case involved the construction of a statute similar to the one here under consideration. By act of June 21, 1860 (12 Stat., 71-2), Congress granted to the heirs of Luis Maria Baca the right to select, in lieu of certain lands claimed by them under a Mexican grant in the vicinity of Las Vegas, New Mexico, "an equal quantity of vacant land, not mineral," in square bodies not to exceed five in number, in the Territory of New Mexico. One of the issues presented by the record was stated in the decision as follows:

> Is the question as to the character of the land selected—that is, whether vacant and not mineral and therefore subject to the grant, or occupied, or mineral, and for that reason not subject to the grant—to be determined with relation to the date of the selection, or with reference to the date of the approval of the survey of the claim?

After considering and deciding that and other questions in the case, the Department directed the Commissioner of the General Land Office, in accordance with the principles announced in the decision, to cause a survey of the grant to be made, based upon the selection of June 17, 1863. With respect to such survey it was said:

> Specific directions should be given that lands vacant, and not known to be mineral at the date of said selection, are to be surveyed as subject to the grant, and that all lands ascertained by the surveyor-general to have been occupied, or known to be mineral, at such date, if any, within the boundaries of said selection, must be excluded from the survey as not being subject to the grant.

Certain language used by the supreme court in the case of Shaw *v.* Kellogg (decided May 22, 1898; 170 U. S., 312, 332) is also of interest

in this connection. One of the series of selections authorized by the act of June 21, 1860 (selection No. 4), was involved in that case. The court, among other things, said:

> The grant was made in lieu of certain specific lands claimed by the Baca heirs in the vicinity of Las Vegas, and it was the purpose to permit the taking of a similar body of land anywhere within the limits of New Mexico. The grantees, the Baca heirs, were authorized to select this body of land. They were not at liberty to select lands already occupied by others. The lands must be vacant. Nor were they at liberty to select lands which were then known to contain mineral. Congress did not intend to grant any mines or mineral lands, but with these exceptions their right of selection was coextensive with the limits of New Mexico.

It is thus seen that before these selections were filed, and within a period of less than two years prior to their filing, both the supreme court and this Department had interpreted the word "vacant," used in an act which, with respect to the matter here under consideration, is the same as the act of 1897, to mean *unoccupied*. There is no foundation for the assertion of counsel to the effect that these selections were made in the light of an established interpretation, either departmental or judicial, of the word *vacant* as applied to the public lands generally, or as used in the act of 1897, contrary to that given in the decision under review.

It is objected that the language of the court in the Shaw-Kellogg case, defining the word "vacant" in the act of 1860 as meaning unoccupied, is mere *obiter*, and, for that reason, no weight should be given to it. In its opinion the court said:

> It will also be perceived that Congress did not permit this location to be made anywhere in the public domain, but only within the limits of the Territory of New Mexico. It was not like a military land warrant, subject to location upon any public lands, but only a grant which could be made operative within certain prescribed and comparatively narrow limits—limits not even so broad as those of the territory ceded by Mexico. There were then but few persons living in New Mexico; it contained large areas of arid lands; its surface was broken by a few mountain chains, and crossed by a few streams. It was within the limits of this territory, whose condition and natural resources were but slightly known, that Congress authorized this location.

Then follows the language first quoted from the decision, wherein it is stated that the only exceptions to the right of selection granted the Baca heirs within the limits of New Mexico were these:

> They were not at liberty to select lands already occupied by others. The lands must be vacant. Nor were they at liberty to select lands which were then known to contain mineral.

The objection relates to the statement of the first exception. Viewed in the light of the earlier decisions in Atherton *v.* Fowler and Hosmer *v.* Wallace, *supra*, wherein the court used the word *vacant* in the sense of unoccupied, and in a manner entirely free from the objection here raised, this statement in Shaw *v.* Kellogg, even if it be *obiter*, is nevertheless of importance and weight as showing what the court considers the ordinary and natural import of the word to be when applied to the public lands.

The case of Cosmos Exploration Company *v.* Gray Eagle Oil Company, decided November 15, 1901 (112 Fed. Rep., 4), by the circuit court of appeals for the ninth circuit, involved the selection, under the act of June 4, 1897, by one J. R. Johnston, of certain lands situated in the same township and section as the lands here in controversy. Practically the same questions were presented in that case as in this. The court held that the word "vacant" was used in the act in the sense of *unoccupied*, the same as held by the Department in the decision under review. In the course of its opinion the court, among other things, said (pp. 14, 15):

From the allegations of the bill, it appears that at the time of appellants' selection of the lands in question, no discovery of any mineral had been made. Appellees could not, at that time, have acquired any title to the lands included in their locations. The discovery of mineral was essential for that purpose; but they were not trespassers upon the public lands of the United States. They had a lawful right to be there. They were in occupancy of the land they had located. They claimed it to be mineral and were diligently at work to prove it to be such. Under these circumstances it can not, in our opinion, be said to be vacant land at the time of appellants' selection thereof under the provisions of the act of 1897. The land was not vacant and open to settlement at that time because it was then occupied by the defendants' grantors under a claim and color of right. It matters not that they had not at that time acquired any rights against the United States.

* * * * * * *

The fact that defendants under their mining locations had not, at the time of Johnston's selection of the land as agricultural, discovered any petroleum, that being the mineral for which their locations were made, shows that they had not perfected their locations under the mining laws; that their absolute right to the exclusive possession of the ground covered by their locations, as against the government of the United States, had not accrued to them, and the government might, if it had seen fit to do so, have terminated the license theretofore given to them to occupy the land, and congress might have granted the land to others. But under the act of June 4, 1897, it will be observed that congress did not grant the right under the forest reserve act to select any lands unless they were vacant. It therefore necessarily follows that, if the land was not vacant and open to settlement, Johnston did not acquire any title to the lands in question. He was, in the eye of the law, a trespasser, because so far as that act is concerned the lands were excepted from such selection, and by attempting to make such selection he was a mere intruder and his grantee is not in a position to question the validity of the defendants' locations.

It is further contended that, even if it be true that the word "vacant," used in the act of 1897, was properly defined in the decision under review, the land department is without the power or authority, by rules and regulations, or otherwise, to require proof of the vacancy or non-occupancy of lands selected under said act to be furnished by the selector as a condition to the acceptance of the selection. Such is not the law.

That the administration of this statute falls within the jurisdiction of the land department there can be no doubt (Bishop of Nesqually *v.* Gibbon, 158 U. S., 155, 167; Knight *v.* Land Association, 142 U. S., 161, 177). Nor can there be any question of the authority of the land department to make rules and regulations appropriate or necessary to

secure the convenient and effective administration of any act of Congress which falls within its jurisdiction (Sec. 2478, R. S.). Besides being specially authorized by statute, such rules and regulations are in many instances absolutely essential to the proper and efficient exercise by the land department of the jurisdiction conferred by law upon it (See Secs. 441, 453, Revised Statutes), and even if there were no special statute on the subject, the power to make such rules and regulations would arise from the inherent necessities of the case.

Every tribunal, upon which the duty of determining contested questions of law or fact is imposed, must of necessity possess the power, when not otherwise specially provided in the law imposing the duty, to establish and maintain rules of practice and methods of procedure whereby to execute the law and to administer evenhanded justice to litigants. The principle is axiomatic.

Wherever, by act of Congress, provision is made for the disposal by selection, entry, and patent, of portions of the public lands of a designated class and character, as was done by the act of June 4, 1897, it is the duty of the land department to ascertain and determine whether lands sought to be acquired under the act are of the class and character thereby made subject to disposal. Until such determination has been made and the lands found to be such as the act describes, entry thereof can not be lawfully allowed. The evidence to enable this to be done, when such evidence does not, and could not from the conditions to be inquired into, appear from the land office records, must of necessity be furnished by those who seek title under the act. The land officers are not required, and from the nature of things could not be required, to take judicial cognizance of the physical condition of lands with respect to which, in the discharge of their duties, they are called upon to act.

Lands occupied by others or known to be valuable for minerals are not subject to selection under the act of 1897. Whether so occupied or known to be valuable for minerals are questions which can not always, or even ordinarily, be determined by anything appearing upon the public records. For the purpose of such determination resort must generally be had to outside evidence. This evidence must be furnished by the selector. It is his duty to show, in so far as physical conditions are concerned, that the land to which he seeks title is of the class and character subject to selection. He can not entitle himself to a patent until he has made such showing. Until then his selection is not complete. Until then he has not complied with the terms and conditions necessary to the acquisition of a patent, and can not be regarded as having acquired any vested interest in the selected land.

The law is settled that until a party seeking title to public lands has complied with all the requirements essential to the establishing of his right to a patent, the right does not vest. See the authorities

cited on this subject in the decision under review. It was said in that decision that—

> The right to a patent is not acquired in any case until the proofs are such that patent could be issued upon them if nothing were shown to the contrary. As long as anything remains undone which it is essential should be done by the selector in order to entitle him to a patent, the right thereto does not vest.

It is not denied by the selector that proofs necessary to establish the right to a patent must be furnished before a patent may be rightfully issued for the selected land, but he contends that the furnishing of such proofs is not essential to the validity of the selection, and therefore not a condition to the vesting of equitable rights under it. The argument is, that if, at the time of filing the selection, the land, as matter of fact, though not shown by any proofs, is of the class and character subject to selection, the equitable title immediately vests in the selector, and that proofs to show the land to be of the requisite class and character may be furnished afterwards, at any time prior to the issuance of patent, to take effect as of the date of filing the selection, even though the condition of the land may have so changed in the mean time as to take it out of the class and character of land subject to selection.

The proposition can not be sustained. It is contrary to the established doctrine that, under proceedings in the land department to acquire title to public land, no equitable rights in the land are to be regarded as having become vested in the party seeking title until he shall have performed all the conditions and fulfilled all the requirements necessary to establish his right to a patent. It is opposed to the principle that as long as anything remains to be done by the party seeking title, which it is essential should be done before patent can be issued, the right thereto does not vest. The land department is not authorized to accept selections under the act of lands not shown, by proper proofs, to be of the class and character subject to selection. Certainly no right can vest in the selector until there arises the duty on the part of the land department to accept the selection.

The statement made in the briefs, to the effect that at the time of filing these selections (December 14, 1899) there was no rule or regulation of the land department which required that selections must be accompanied by evidence showing the selected land to be unoccupied, is not justified by the facts. The printed form of application set out in the decision under review (form 4–643) was prescribed by the Commissioner of the General Land Office in April, 1898, and approved by the Secretary of the Interior May 9, 1899 (28 L. D., 521, 524), as in said decision stated. It contained the following clause:

> There are also submitted certificates from the proper officers showing that the land relinquished, or surrendered, is free from encumbrance of any kind; also that all taxes thereon, to the present time, have been paid; and an affidavit showing the lands selected to be non-mineral in character and unoccupied.

This form of application was in use at the time the selections were filed. No other had been issued with the approval of the Secretary of the Interior. The clause requiring the selector to submit with his selection "an affidavit showing the lands selected to be non-mineral and unoccupied" is clear and unequivocal. There can be no doubt as to its meaning.

It was stated by counsel at the oral argument, and the statement is repeated in a brief since filed, that the form of application in use at the time these selections were filed contained a requirement that "evidence of publication" should be submitted with all selections, a thing impossible inasmuch as publication was not required until after the selections were filed. Counsel are mistaken. The facts are, that prior to January, 1900, the only prescribed form of application was the one (4–643) copied into the decision under review. At the date last named a new form, like the old one, excepting that, after the words "encumbrance of any kind" in the clause above quoted, the words "evidence of publication" were inserted, was printed at the instance of the General Land Office. The additional words were inadvertently inserted without any authority from the Secretary of the Interior, who afterwards directed that the changed form be not used. This matter, however, has no bearing upon the case under consideration.

One other matter should be mentioned. It is urged that, even if the departmental regulations, at the time of the filing of the selections in question, required that proof of the vacancy or non-occupancy of the selected land should accompany the selections, the acceptance of these selections by the local land officers in the absence of such proof was a waiver of the requirement, and that such waiver is binding on the government.

The proposition is unsound. If followed as a rule of law the Secretary of the Interior would be practically shorn of the supervisory power and authority over the disposal of the public lands, vested in him by sections 441, 453, and 2478 of the Revised Statutes. The action of the local land officers upon questions of law or fact respecting the disposal of the public lands does not conclude their superior officers or the government. Such action is, in all cases, reviewable by the Commissioner of the General Land Office, and by the Secretary of the Interior, as the proper administration of the law or the demands of justice may require (Orchard *v.* Alexander, 157 U. S., 373; Knight *v.* Land Association, 142 U. S., 161; Parsons *v.* Venzke, 164 U. S., 89).

It would serve no useful purpose to discuss all the authorities which have been cited, or to specially state all the arguments advanced. It is enough to say, in conclusion, that, after careful consideration of all that has been presented, the Department finds no error in the original decision. The rulings complained of are accordingly adhered to, and the motion for review is overruled.

188 *Rule to Show Cause.*

Filed April 16, 1902.

In the Supreme Court of the District of Columbia.

THE UNITED STATES OF AMERICA on the Relation of The Riverside Oil Company (a Corporation), Petitioner,
vs.
ETHAN A. HITCHCOCK, Secretary of the Interior, Defendant.
} At Law. No. 45343.

Upon consideration of the relation and petition of the Riverside Oil Company, filed in the above-entitled cause, and of the exhibits filed with the said petition, it is this 16th day of April 1902, by the court ordered that the defendant Ethan A. Hitchcock, Secretary of the Department of the Interior of the United States of America, show cause, if any he has, before this court on the 25th day of April, 1902 at ten o'clock, why a writ of mandamus should not be issued to him as prayed by said petitioner, provided that a copy of this rule be served on said defendant not later than the 19th day of April, 1902.

A. C. BRADLEY, *Justice.*

Marshal's Return.

Served copy of within order on defendant, April 16, 1902.
AULICK PALMER, *Marshal.*
B.

189 *Answer of Ethan A. Hitchcock, &c.*

Filed May 14, 1902.

In the Supreme Court of the District of Columbia.

THE UNITED STATES OF AMERICA *ex Rel.* Riverside Oil Company, a Corporation,
vs.
ETHAN A. HITCHCOCK, Secretary of the Interior.
} At Law. No. 45343.

The answer of Ethan A. Hitchcock, Secretary of the Interior, to the rule to show cause why a writ of mandamus should not issue on the relation of the above-named petitioner.

This respondent, admitting, upon information and belief, the allegations of the first five paragraphs of the petition of the said

petitioner to be true, in answer to the said petition and as cause against the said rule, shows as follows:

1. In the local land office at Visalia, California, on December 14th, 1899, one C. W. Clarke, claiming to be the owner of two certain tracts of land under patents from the United States and included within the limits of a public forest reservation, did file two separate applications to select in lieu thereof under the act of June 4, 1897, 30 Stat., 36, the following portion of the public land, to wit:

The N. ½ of the S. E. ¼ of sec. 4, T. 29 S., R. 28 E., M. D. M. and the S. ½ of the N. E. ¼ of said sec. 4, T. 29 S., R. 28 E., M. D. M.

With each of said applications the said Clarke filed an affi-
190 davit in support thereof, as hereinafter set forth and described and two deeds of conveyance purporting to convey to the United States the two said tracts of land embraced within the said forest reservation.

2. A form of application to select other lands under said act of June 4, 1897, was prescribed by the Commissioner of the General Land Office in April, 1898, and approved by the Secretary of the Interior May 9th, 1899, which was in force when said applications were made and which contained among other things the following clause:

There are also submitted certificates from the proper officers showing that the land relinquished, or surrendered, is free from incumbrance of any kind; also that all taxes thereon, to the present time, have been paid; and an affidavit showing the lands selected to be non-mineral in character and unoccupied.

The allegation showing the lands selected to be non-mineral in character and unoccupied was an essential averment for the reason that unless the said lands were non-mineral in character and unoccupied the same were not vacant lands open to settlement within the intent and meaning of the said act of June 4, 1897.

3. The affidavits above mentioned as having been filed with the said application were made out upon a printed form which is in the words and figures following, to wit:

(Act of June 4, 1897.)

Affidavit of Non-mineral Character and Non-occupancy.

U. S. LAND OFFICE.

—— —— being duly sworn according to law deposes and says that he is over the age of 21 years, a citizen of the United States and of the State of —— and a — by — and is well acquainted with the character of the following-described land and with each and every legal subdivision thereof, to wit:

191 That there is no occupation of said land adverse to the selection thereof under the act of June 4, 1897, by —. That the said tract applied for is agricultural in character and contains no known deposits of coal, or other minerals, and is not subject to entry under

the coal or mineral land laws of the United States: *This affidavit is made upon the evidence found upon the surface of the ground. Deponent does not undertake to express any opinion as to what may be under the ground.*

That he has frequently passed over the same and his personal knowledge of said land is such as to enable him to testify understandingly in regard thereto; that there is not to his knowledge, within the limits thereof, any vein or lode of quartz or other rock in place, bearing gold, silver, cinnabar, lead, tin or copper, or any deposit of coal; that there is not within the limits of said land, to his knowledge, any placer, cement, gravel, or other valuable mineral deposits; that no portion of said lands is claimed for mining purposes under the local customs or rules of miners or otherwise; that no portion of said land is worked for mineral during any part of the year by any person or persons; that said land is essentially non-mineral land and that the application therefor is not made for the purpose of fraudulently obtaining title to mineral land, but with the object of securing said land for agricultural purposes, *so far as deponent knows;* and that the above and foregoing statements as to the character of said land apply to each and every legal subdivision thereof, and that his post-office address is ——,

—— ——.

But the said applicant Clarke erased from the said form the following words, to wit: "That there is no occupation of said lands adverse to the selection thereof under the act of June 4th, 1897, by," and the words following, to wit: "That no portion of said land is claimed for mining purposes under the local customs or rules of miners or otherwise," and to the averment in said affidavit that the said land contains no known deposits in coal or other mineral and is not subject to entry under the coal or mineral land laws of the United States, the said applicant Clarke added the words, "This affidavit is made upon the evidence found upon the surface of the ground. Deponent does not undertake to express any opinion as to what may be under the ground;" and to the averment in said affidavit that the application was not made for the purpose of fraudulently obtaining title to mineral land, but with the object of securing said land for agricultural purposes, the said applicant Clarke added the words following: "So far as deponent knows."

192 And this deponent shows that each and every of the allegations erased and omitted from the said affidavit by the said Clarke were necessary and indispensable allegations for the purpose of enabling the said Clarke to select the said lands in lieu of the land proposed to be relinquished, for the reason that if the said lands were occupied adversely to the selection thereof under the act of June 4th, 1897, by any person or persons, or if any portion of said land was claimed for mining purposes under the local customs or rules of miners or otherwise, which said local customs or rules of miners are by act of Congress made part of the mining laws of the United States, then the said lands were not

vacant lands open to settlement within the intent and meaning of the said act of June 4th, 1897. And this respondent further avers and shows that the words added to the said affidavit of the said Clarke as aforesaid negatived and destroyed the force and effect of the averment of the said affidavit as to the supposed known character of the said land as non-mineral and as not being subject to entry under the coal and mineral land laws of the United States.

4. Thereafter, on February 6th, 1900, the Kern Oil Company filed a protest against the said selections and each of them, which said protest was supported by affidavits alleging in substance that the said Kern Oil Company and its predecessors in interest were at the time of the filing of said selections and had continuously been, and at the time of the protest were, in the possession and occupancy of the lands aforesaid, claiming, working and developing the same under certain placer mining locations made June 11th, 1899, known as the "Fossil and June Bug claims," that said lands were of great value for
193 the deposits of petroleum oil contained therein, and were known to be valuable for such deposits when the said selections were filed and were and are worthless for agricultural purposes, that the said lands lie in one of the greatest mineral oil belts in the State of California, and in the immediate vicinity of other valuable oil-mining claims; that the oil-bearing formation underlying the land is flat or horizontal, known as a blanket formation; that Clarke well knew the mineral character of the lands when he selected the same; and that the filing of said selections was an endeavor on his part to fraudulently obtain title to mineral lands under the act of June 4th, 1897. On February 12th, 1900, J. F. Ellwood and others filed separate protests against said selections alleging possession and occupancy of the land for oil-mining purposes substantially to the same effect.

5. Thereafter the matter in contest came on for hearing before the Commissioner of the General Land Office, who, after a full, fair and impartial hearing of the said applications and affidavits in support thereof and the protests and affidavits in support thereof decided that the allegations made in the protests should be investigated at a hearing to be conducted in accordance with the following principles, viz:

That inasmuch as the selections had not yet been approved by the Land Department and consequently the lands embraced therein had remained open to occupancy or exploration for minerals, evidence with respect to their present condition and as to whether vacant or unoccupied, and with respect to their present character as to whether known to contain valuable mineral deposits or not, should be taken and received for the purpose of determining whether or not the said selections should be approved.

From which said decision the said Clark appealed to the Secre-
194 tary of the Interior, and such appeal came on duly to be heard.

6. Whereupon the said Secretary of the Interior, in the exercise of the duty imposed upon him by law to hear and determine

an appeal from the Commissioner of the General Land Office, causes and controversies relating to the public lands of the United States and claims therefor, after a full, fair and impartial hearing and due and deliberate consideration of the applications, affidavits, briefs, printed and oral arguments made to and before him, and the assistant attorney general for the Interior Department acting in that behalf, did, on April 25th, 1901, formally and officially decide that inasmuch as the selector Clarke, in making applications for the said lands had not, by proper averments or by any averments, shown or set forth that the said lands were, at the time of said selection, vacant lands open to settlement within the intent and meaning of the said act of June 4th, 1897, of which fact of vacancy at such date, as a matter of fact, the said selector was, and the Land Department was not and could not have been cognizant, but, so to set forth and show had wholly failed and neglected and wilfully refused, theretofore, the said selector had not, in and by his said applications and affidavits in support thereof, shown himself entitled, as of the date of said attempted selection, to select the said lands or to obtain a patent therefor, but, on the contrary, had failed to comply with the requirements of the land and to furnish the proofs necessary to validate the said attempted selection or to enable the Land Department to issue any patent therefor or to vest in him, the said Clarke, any right to the same, and that, in consequence of such failure, the lands remained the property of the United States and open to exploration for mining purposes or to occupation and entry under the laws, and within the jurisdiction and
195 control of the Land Department. And inasmuch as it further appeared in proof and was admitted that, while the said lands so remained the property of the United States and so opened to exploration, or to occupation and entry, and before the said selector Clarke had, by proper averments, shown that the said lands were subject to selection or that he was entitled to select the same as vacant lands open to settlement, the protestants had gone into possession and occupancy thereof and had made discovery of petroleum therein and were claiming, working and developing the same under certain placer mining locations under the laws of the United States in that case made and provided; and inasmuch as before the said requirements and conditions had been complied with it became known and was admitted that the said lands were in point of fact valuable for mines and minerals and worthless for agricultural purposes, therefore, the said supposed selections of the said Clarke should not be and were not approved and the same were accordingly rejected, which decision is referred to in the petition herein and a copy of which is filed therewith marked Exhibit "T."

7. Respondent further shows, that, after the decision aforesaid, said petitioner prosecuting in the name and right of the said Clarke, made a motion for a review of the said decision, upon which motion, the said petitioner was by his counsel, as well as by printed briefs and arguments, fully, fairly and impartially heard.

8. Thereupon, after the rendition of the said decision and after

the filing of the motion for a review thereof, and while the same was depending before the said department, to wit, on June 5th, 1901, the petitioner, acting in the name and in the right of the said Clarke, caused to be filed in the Land Department two certain affida-
196 vits in support of the two selections by him made respectively, setting forth that the said selected lands were unoccupied at the date of the said attempted selection; which said affidavits this respondent avers were wholly ineffectual in law to vest any right in petitioner or to entitle him to the grant of a patent for said land, either as of the date of the said supposed selection, which was nearly two years prior to the filing of the said affidavits, or as of the date of the said filing, because of the fact that prior to said filing the contestants had entered upon the said lands and were in possession and occupancy thereof and were claiming, working and developing the deposits of mineral found therein and because of the fact that the said lands had thereby, and before the filing of the said affidavits, become known as valuable for minerals and had acquired the known character of mineral lands under the laws of the United States and as such were not open to settlement.

9. A hearing having been granted upon said motion for review, the same came on for oral argument and for hearing on October 8th, 1901, before the assistant attorney general for the Interior Department acting for the Secretary of the Interior in that behalf, and thereafter, upon mature, careful and deliberate consideration, as well of the oral argument as of the printed briefs and arguments filed on the part of the said petitioner, the said Secretary, this respondent, acting with the advice of the said assistant attorney general for the Interior Department, decided that the department could find no error in the original decision and accordingly adhered to the rulings contained therein and overruled the motion for review, a copy of which said decision, bearing date April 12th, 1902, is filed with the petition herein marked Exhibit "Y."

197 10. And this respondent denies that he has illegally or arbitrarily held or decided any matter or thing whatsoever in respect of the said application for selection, and he avers that by the laws of the United States the duty is imposed upon him to construe the acts governing the disposition of public lands of the United States and of applying the same to cases coming before him on appeal from the Commissioner of the General Land Office; that in pursuance of the duties so imposed he was required to construe and apply the terms of the act of Congress of June 4th, 1897, wherein it was provided that the owner of land included within the limits of the public forest reservation might select in lieu thereof a tract of vacant land open to settlement, and that he accordingly did, in the exercise of his judgment and discretion in that behalf construe the said term "vacant land open to settlement" to exclude land in the actual occupation of any person or persons under the local customs or rules of miners which said customs and rules are by statute incorporated into and became part of the laws of the United States; that the Commissioner of the General Land Office, under the direction of the Secretary of the Interior,

is authorized to enforce and carry into execution, by appropriate regulations, every part of the provisions of laws relating to public lands; that in the exercise of his authority it became and was his duty to make regulations to carry into execution the act of June 4th, 1897, for the selection of lands in lieu of lands included within the limits of the public forest reservation; that in pursuance of such duty he did, under the direction of the Secretary of the Interior, by a form approved by the Secretary on May 9th, 1899, make and establish a regulation for the execution of said law which said regulation required that there should be submitted with the application to se-
198 lect an affidavit showing the lands selected to be non-mineral in character and unoccupied, and which said form of application was in force at the time when the attempted selections were made by the said Clarke; that the administration of the law relating to the selection of lands in lieu of lands included within the public forest reservation was wholly within the jurisdiction of the said Commissioner of the General Land Office, under the direction of the Secretary of the Interior; that in the exercise of this discretion said Commissioner in a proper proceeding for that purpose passed upon and decided the right of the said selector Clarke to the land so selected, and that an appeal to this respondent as Secretary of the Interior, authorized and charged with the supervision of the public business relating to public lands including mines, this respondent held and decided that, by reason of the failure of the said Clarke to show in due and proper form that the said lands were at the date of said selection subject to selection as vacant lands open to settlement, the attempted selection thereof must be rejected; wherefore it became and was unlawful for this respondent, as such Secretary, or for the Commissioner of the General Land Office acting under his direction, to order any patent or patents to the said lands to issue to the said Clarke as in the said petition prayed to be commanded.

ETHAN A. HITCHCOCK,
Secretary of the Interior.

ASHLEY M. GOULD,
U. S. Attorney for the District of Columbia,
HENRY H. GLASSIE,
Ass't U. S. Attorney, D. C.,
Solicitors for the Respondent.

199 DISTRICT OF COLUMBIA, *ss:*

I, Ethan A. Hitchcock, Secretary of the Interior, on oath, say that I have read the foregoing answer to the rule to show cause, and that the facts therein set forth of personal knowledge are true, and those set forth upon information and belief I believe to be true.

ETHAN A. HITCHCOCK,
Secretary of the Interior.

Subscribed and sworn to before me, a notary public in and for the District aforesaid, this 14th day of May, A. D. 1902.

WM. H. DE LACY,
[SEAL.] *Notary Public.*

Stipulation of Counsel as to Survey, &c.

Filed June 12, 1902.

In the Supreme Court of the District of Columbia.

THE UNITED STATES OF AMERICA *ex Rel.* Riverside Oil Company
vs.
ETHAN A. HITCHCOCK, Secretary of the Interior.
} At Law. No. 45343.

It is stipulated that the official survey of township 29 south, range 28 east, M. D. M., California, approved by the surveyor general for the State of California February 28, 1855, which
200 includes the lands involved in this proceeding, returns the lands in said township as follows, viz:

"Between secs. 3 and 4. Land broken. Soil 2nd rate.

"Between secs. 4 and 9. Land level. Soil 2nd rate.

"Between secs. 4 and 5. Land little rolling. Soil 2nd rate.

"The southern portion of this township is very level with a slight sandy soil. The middle and northern portions are slightly undulating with a fair 2nd-rate sandy soil. Immediately along Kern river which runs through the northern portion of the township the soil is of a first-rate quality.

"There is but little bottom land to Kern river until you reach the western portion of the township. The ferry which crosses Kern river is situated in this township and is kept by an old man, the only person living in the township."

That in showing the position of the Kern river referred to in the field-notes, said field-notes further contain the following:

"In running line between secs. 2 and 3 set quarter corner at 39.50 chains and at 58.50 chains reached north bank Kern river.

"In running north between secs. 9 and 10 reached south bank Kern river at 68 chains and the north bank at 73 chains and course southwest."

JEFFERSON CHANDLER,
JOHN M. THURSTON,
Attorneys for Petitioner.
ASHLEY M. GOULD.
HENRY H. GLASSIE.

J. S. CHAPMAN,
Special Assistant of Counsel.

201 *Demurrer to Answer of Defendant.*

Filed June 12, 1902.

In the Supreme Court of the District of Columbia.

THE UNITED STATES *ex Rel.* RIVERSIDE OIL Company
vs.
ETHAN A. HITCHCOCK, Secretary of Interior. } No. —. At Law.

The petitioner demurs to the answer of the defendant, and says that the same is insufficient and bad in form and substance.

JEFFERSON CHANDLER,
JOHN M. THURSTON,
Attorneys for Petitioner.

Among the matters of law intended to be argued in support of said demurrer are:

1. That the matters set up are insufficient in form and substance to justify the action of the defendant complained of.
2. That the said matters show that the said defendant acted unlawfully and arbitrarily in the premises.
3. That the said matters show that the petitioner is entitled to patents for the lands in question.
4. That the defendant has failed to set up a good defense to the petition.

202 *Order Overruling Demurrer.*

In the Supreme Court of the District of Columbia.

UNITED STATES OF AMERICA *ex Rel.* RIVERSIDE Oil Company, Petitioner,
vs.
ETHAN A. HITCHCOCK, Secretary of the Interior, Respondent. } No. 45343. Law.

This cause came on to be heard upon the petition and the exhibits filed therewith, the answer and return of the respondent and the exhibits filed therewith, the demurrer of the petitioner filed herein on June 12th, 1902, and the stipulation of counsel as to the surveyor's return of certain lands filed on June 12, 1902: Upon consideration whereof it is, this 25th day of June, 1902, adjudged and ordered that said demurrer be and the same is hereby overruled.

HARRY M. CLABAUGH,
Associate Justice.

203 *Motion for Rehearing of Demurrer.*

Filed June 3, 1902.

In the Supreme Court of the District of Columbia.

THE UNITED STATES OF AMERICA *ex Rel.* THE Riverside Oil Co.
vs.
ETHAN A. HITCHCOCK.
At Law. No. 45343.

Comes now the petitioner, by its attorneys and moves the court to vacate the order passed herein overruling petitioner's demurrer to the defendant's answer and grant a rehearing of said demurrer and for cause shows:

1. The court erred in overruling the demurrer.

2. The court erred in not sustaining the demurrer and giving judgment on the pleadings for petitioner.

3. The court erred in not holding upon the pleadings that the exchange of lands in the petition mentioned was complete except the delivery to petitioner of the patent for the lands selected.

4. The court erred in holding that any proof of the character of the land outside of the Land Office records was essential to the selection or could in law be demanded of the selector as a condition precedent to, or as a part of, the selection. And since the decision of the court in this case, the defendant has transmitted a communication to Congress calling attention to the cases in the Federal courts where his authority to require affidavits not prescribed by the statute has been denied and asking that a law be passed giving
204 him such authority, a true copy of which is filed herewith and made part hereof.

5. The court erred in holding that the form relied upon by the defendant, was a regulation of the Land Department.

6. The court erred in holding that under the act of June 4, 1897, any affidavit was required as a part of the selection.

7. The court erred in substituting in the act of June 4, 1897, the words "unoccupied land" for the words "vacant land."

8. The court erred in not accepting the admission of counsel for the defendant that no right or claim of right was made in behalf, or in the interest, of the protestants and that the issues in the case were wholly between the selector and the United States, as will appear from a true copy of an extract from the stenographic report of the argument filed herewith and made part hereof.

9. The court failed to give the petitioner the benefit of the presumptions of law and fact arising in the case, viz: That the United States occupied the lands at the date of selection and that the land when selected was non-mineral; and the admission in the pleadings that the land at the time of selection was vacant land open to settlement, as shown by the land records and non-mineral and unoccupied in fact.

10. The court failed to give the petitioner the benefit of the admission in the pleadings that dozens of patents had been issued under the law of June 4, 1897, in the absence of affidavits of any kind, and the benefit of the defendant's declaration in the
205 case of Hyde and that statute is too clear to admit of construction.

JEFFERSON CHANDLER,
W. C. PRENTISS,
M. A. BALLINGER,
Attorneys for Petitioner.

DISTRICT OF COLUMBIA, *ss:*

I, M. A. Ballinger, being duly sworn, says that he is of counsel for the above-named petitioner and that the writings filed herewith are true copies of an official communication transmitted to Congress by the defendant in the above-entitled cause and an extract from the stenographic report of Mr. Glassie's argument as revised by him.

M. A. BALLINGER.

Subscribed and sworn to before me this 3rd day of July, A. D. 1902.

[SEAL.] ALBANUS S. T. JOHNSON,
Notary Public.

206 Copy.

DEPARTMENT OF THE INTERIOR,
W. V. D. WASHINGTON, *June* 26, 1902.

The chairman of the Committee on Public Lands, House of Representatives.

SIR: I inclose a draft of a proposed bill "relating to proofs in homestead and other claims to public lands and punishing false swearing therein, and for other purposes."

Within the last few months, in criminal cases arising under the public land laws, there have been five or six decisions adverse to the United States and in opposition to many years' uniform practice in the Land Department. Whether correct or not, these decisions very seriously disturb the administration of the public land laws; if not correct, the Government has no satisfactory method of obtaining an authoritative decision to that effect, because appeals are not accorded to the Government where it is unsuccessful in the trial court in criminal prosecutions.

In two cases which have just been brought to my attention, it was held by a United States district judge that a homestead entryman who, to obtain the allowance of his application for a homestead entry, makes affidavit that the land is not mineral, when in fact he knows that it has been discovered and developed to contain valuable mineral deposits and is located and claimed under the mining laws,

cannot be prosecuted for perjury, because, under section 2990 of the Revised Statutes, as well as under that section as amended by
207 the act of March 3, 1891 (26 Stat., 1095, 1098), it is prescribed that the homestead applicant shall make a certain specified affidavit (having no reference to the mineral or none-mineral character of the land), "and upon filing such affidavit with the register and receiver" and upon the payment of a certain fee to such officers, "he or she shall thereupon be permitted to enter the amount of land specified." The judge took the view that this section, by prescribing the subject-matter to be covered by the affidavit and then declaring that upon the filing of that affidavit and paying the requisite fee the entry shall be allowed, in effect declared that no other affidavit or proof shall be required as a condition to the allowance of the entry; and that a requirement that in this affidavit or any additional one there shall be a showing that the land is not mineral, is something beyond the statute and which the Land Department is not authorized to require, and therefore perjury cannot be predicated thereon.

Another United States judge has very recently held that under section 2291 of the Revised Statutes a homestead entryman is not required to make personal oath to his compliance with law in the matter of inhabitancy and cultivation; that the proof of this is to be made "by two credible witnesses," and not by the entryman; and that if the entryman himself makes oath to his inhabitancy and cultivation, he does so unnecessarily and not in conformity to the statute, and therefore no crime can be predicated upon his swearing falsely therein.

In another case it was held that proof of the non-mineral character of the land cannot be exacted of the entryman or his witnesses at the time of the making of final proof, because section 2291 prescribes the matters to which such proof is to be directed,
208 and then declares that thereupon the entryman "shall be entitled to a patent." The holding is to the effect that this section, by prescribing what proof shall be required, and not mentioning the character of the land, precludes the Land Department from exacting any evidence upon this subject in connection with final proof.

Section 2294 of the Revised Statutes and amendments thereto authorize the administration of oaths in public land proceedings by a clerk of a court of record, and authorize proofs in land entries to be made before such clerk. In a very recent case it was held that these statutes do not authorize the administration of oaths by deputy clerks or the taking of proofs before them, and that perjury cannot be predicated upon a false oath taken before such deputy.

Under section 2302 of the Revised Statutes, and other laws, mineral lands are not subject to entry under the homestead law, save in a few excepted States to which the mineral laws do not apply and it has been the uniform practice of the Land Department, since the passage of the homestead law, to require the filing of a non-mineral affidavit by the homestead applicant as a condition to the

allowance of his entry. It has also been the uniform practice to require the entryman himself, who necessarily is best informed, to make personal oath, at the time of submitting final proof, to his compliance with the law in the matter of inhabitancy and cultivation.

Ever since the enactment of the statutes authorizing oaths and proofs in land proceedings to be taken and made before clerks of courts of record, it has been held, under the part of section one of the Revised Statutes which says "and the reference to any officer shall include any person authorized by law to perform the
209 duties of such office," that these oaths and proofs may be taken and made before a deputy of a clerk of a court of record, wherever by law a deputy is provided for and authorized generally to perform the duties of his principal.

The practice in these matters has long been evidenced by regulations which are believed to be authorized and justified by sections 441, 453, and 2478 of the Revised Statutes.

The decisions referred to herein, coming from judicial tribunals, cast a cloud over the proceedings of the character to which they refer, and are calculated, whether right or wrong, to produce incalculable mischief. It is submitted that this situation can best be corrected by legislation which will clearly set each of these matters at rest, without disturbing the existing practice or entailing greater expense or hardship upon public land applicants, and which will enable such reasonable requirements to be enforced as will safeguard the public interests and the transactions of honest claimants.

I beg to respectfully ask that this matter may receive the early attention of your committee.

Very respectfully,

(Signed) E. A. HITCHCOCK (*Secretary*).

Mr. GLASSIE: * * *

The issue in this case, if your honor pleases, is not an issue between the selector and the protestant or the contestant in any
210 sense; it is an issue between the selector and the United States. The protestant is not in this court, in any way, direct or indirect. He was not in the Land Department in respect to the matter which we have here to consider, except as a means of informing the United States that the land which the selector attempted to take under this act was not subject to be taken under that act. The issue is here, whether or not, by certain proceedings in the judicial department of the Land Department, a title—legal title, not the equitable title, but the legal title—is vested in the selector, so that the issuance of the patent has been reduced, shrunken, to a ministerial act.

* * * * * * *

Order Overruling Motion, &c.

Filed October 3, 1902.

In the Supreme Court of the District of Columbia.

U. S. *ex Rel.* RIVERSIDE OIL COMPANY
v.
ETHAN A. HITCHCOCK. } No. 45343.

This cause came on to be heard upon the motion of the petitioner for a rehearing whereupon it is this 3rd day of October, 1902, adjudged and ordered—that the said motion be, and the same is hereby overruled and that the order overruling the demurrer
211 be and the same is hereby confirmed with leave to plead within twenty days.

HARRY M. CLABAUGH, *Justice.*

212 Supreme Court of the District of Columbia.

THURSDAY, *October 23rd*, 1902.

Session resumed pursuant to adjournment, Hon. H. M. Clabaugh, justice, presiding.

THE UNITED STATES OF AMERICA on the Relation of The Riverside Oil Company, a Corporation, Petitioner,
vs.
ETHAN A. HITCHCOCK, Secretary of the Interior, Defendant. } No. 45343. At Law.

Comes again the petitioner herein by its attorneys, and in open court elects to stand upon its demurrer to respondent's answer herein filed. Whereupon, said demurrer having been heretofore overruled; it is considered and adjudged, that the rule to show cause issued herein be discharged; that the prayers herein of said petitioner be denied, that said petition be, and it is hereby dismissed at petitioner's costs.

From the aforegoing judgment, said petitioner by its attorneys in open court, notes an appeal to the Court of Appeals, of the District of Columbia, and prays that the amount of the bond be fixed.

Whereupon, bond for costs on said appeal is hereby fixed in the sum of one hundred ($100.00) dollars, with surety or sureties approved by this court, with leave to deposit in the registry of this court in lieu of such bond, the sum of fifty ($50.00) dollars.

213 *Memorandum.*

November 5, 1902.—Appeal bond filed.

214 Supreme Court of the District of Columbia.

UNITED STATES OF AMERICA, *District of Columbia,* } ss:

I, John R. Young, clerk of the supreme court of the District of Columbia, hereby certify the foregoing pages, numbered from 1 to 157, inclusive, to be a true and correct transcript of the record, as per directions of counsel herein filed, copy of which is made part of this record, in cause No. 45,343, at law, wherein The United States of America, on the relation of The Riverside Oil Company, a corporation, is petitioner, and Ethan A. Hitchcock, Secretary of the Interior is respondent, as the same remains upon the files and of record in said court.

Seal Supreme Court of the District of Columbia.

In testimony whereof, I hereunto subscribe my name and affix the seal of said court, at the city of Washington, in said District, this 13″ day of December, A. D. 1902.

JOHN R. YOUNG, *Clerk.*

215 In the Court of Appeals of the District of Columbia.

THE U. S. *ex Rel.* RIVERSIDE OIL CO., Appellant,
vs.
ETHAN A. HITCHCOCK, Sec'y of the Interior. } No. 1264.

It is hereby stipulated that the clerk shall in the printed record in the above-entitled cause, omit decision in Gray Eagle case pages 139 to 151, both inclusive, and second decision in same case, line 11 page 179 to page 187 both inclusive.

SHIRLEY C. WARD,
W. C. PRENTISS,
Attorneys for Appellant.
ASHLEY M. GOULD,
HENRY H. GLASSIE,
Attorneys for Appellee.

(Endorsed:) No. 1264. The U. S. of A. on the relation of The Riverside Oil Co., a corporation, appellant, *vs.* Ethan A. Hitchcock, Secretary of the Interior. Stipulation of counsel as to printing record. Court of Appeals, District of Columbia. Filed Dec. 15, 1902. Robert Willett, clerk.

Endorsed on cover: District of Columbia supreme court. No. 1264. The United States of America on the relation of The Riverside Oil Company, a corporation, appellant, *vs.* Ethan A. Hitchcock, Secretary of the Interior. Court of Appeals, District of Columbia. Filed Dec. 13, 1902. Robert Willett, clerk.

WEDNESDAY, *January* 21*st*, *A. D.* 1903.

THE UNITED STATES OF AMERICA on the Relation of the Riverside Oil Company, a Corporation, Appellant, *vs.* ETHAN A. HITCHCOCK, Secretary of the Interior } No. 1264.

On motion the appellant is allowed one-half hour additional time in the argument. The argument in the above-entitled cause was commenced by Mr. Jefferson Chandler attorney for the appellant, and was continued by Messrs. H. H. Glassie and John S. Chapman attorneys for the appellee.

THURSDAY, *January* 22*d*, *A. D.* 1903.

THE UNITED STATES OF AMERICA on the Relation of the Riverside Oil Company, a Corporation, Appellant, *vs.* ETHAN A. HITCHCOCK, Secretary of the Interior. } No. 1264.

The argument in the above-entitled cause was concluded by Mr. John M. Thurston, attorney for the appellant.

THE UNITED STATES OF AMERICA on the Relation of the Riverside Oil Company, Appellants, *vs* ETHAN A. HITCHCOCK, Secretary of the Interior. } No. 1264.

Opinion.

(Mr. Justice Morris delivered the opinion of the court.)

This is an appeal from an order of the supreme court of the District of Columbia, refusing the issue of a writ of mandamus and dismissing a petition therefor.

The Riverside Oil Company, the petitioner for the writ, is a body corporate under the laws of the State of Nevada, and, as stated in the petition, is empowered to acquire and hold land in the State of California, wherein by the present proceedings it seeks to acquire some public land of the United States, as the assignee of the right of one C. W. Clarke. The purpose of its proceeding is to require the Secretary of the Interior Department to issue a patent to it for the lands in question.

By an act of Congress of March 3, 1891, (26 Stat. 1095), the President of the United States was authorized "from time to time to set apart and reserve, in any State or Territory having public land bearing forests, in any part of the public lands wholly or in part covered with timber or undergrowth, whether of commercial value or not, as public reservations," and by public proclamation "declare the establishment of such reservations, and the limits thereof." In pursuance of this act, the President, by public proclamation issued on February 14, 1893, established what is known as the "Cascade Range

forest reservation" in the State of Oregon. Within the limits of this reservation C. W. Clarke, heretofore mentioned, had become the owner of two tracts of land, one of 40 acres, and the other of 120 acres, and had received patents for them. Under an act of Congress of June 4, 1897 (30 Stat. 36) he and others similarly situated were authorized to surrender their lands to the United States, and to receive in exchange for them any other public lands of the United States which were vacant and open to settlement. The act, so far as it bears upon the present subject, is as follows:

"That in cases in which a tract covered by an unperfected *bona fide* claim or by a patent is included within the limits of a public forest reservation, the settler or owner thereof may, if he desires to do so, relinquish the tract to the Government, and may select in lieu thereof a tract of vacant land open to settlement not exceeding in area the tract covered by his claim or patent; and no charge shall be made in such cases for making the entry of record or issuing the patent to cover the tract selected: *Provided further*, That in cases of unperfected claims the requirements of the law respecting settlement, residence, improvements, and so forth, are complied with on the new claims, credit being allowed for the time spent on the relinquished claims."

On December 14, 1899, Clarke filed in the United States land office at Visalia, in the State of California, two separate applications for two distinct parcels of the public land in that State, to be taken by him in lieu of his lands in Oregon, within the Cascade reservation, for which he then and there filed deeds of conveyance to the United States: and in support of each application he filed an affidavit as to the non-mineral character of the land and their non-occupancy by other persons, such as had been prescribed by the Commissioner of the General Land Office, but with some modifications therein made by himself. These papers were all duly transmitted to the General Land Office in this city.

In order to carry into effect the provisions of the act of Congress of June 4, 1897, which authorized this exchange of lands, the Commissioner of the General Land Office, in April, 1898, prescribed a form of application, subsequently approved by the Secretary of the Interior, to be used by selectors of land under that act, which contained certain requirements to be complied with by the applicants, some of which are challenged by the relator in this case as being beyond the authority of the Commissioner or of the Secretary of the Interior to prescribe. The main requirement was that of an affidavit showing the lands selected to be non-mineral in character and unoccupied. As the controversy in this case has turned in great measure upon this affidavit, both in the Land Office, and in the Department of the Interior, and in this court, it is proper to insert it here in full, noting in brackets certain portions of it which were crossed out and eliminated by the affiant, and underlining in italics certain additions made by him. The affidavit as filed by the relator is in the following terms:

"—— —— being duly sworn according to law deposes and says that he is over the age of 21 years, a citizen of the United States and

of the State of —— and a —— by ——, and is well acquainted with the character of the following-described land and with each and every legal subdivision thereof, to wit ——

"[That there is no occupation of said land adverse to the selection thereof under the act of June 4, 1897, by —— ——.]

"That the said tract applied for is agricultural in character and contains no known deposits of coal or other minerals, and is not subject to entry under the coal or mineral land laws of the United States:

"*This affidavit is made upon the evidence found upon the surface of the ground: deponent does not undertake to express any opinion as to what may be under the ground.*

"That he has frequently passed over the same and his personal knowledge of such land is such as to enable him to testify understandingly in regard thereto; that there is not to his knowledge within the limits thereof any vein or lode of quartz or other rock in place, bearing gold, silver, cinnabar, lead, tin or copper, or any deposit of coal; that there is not within the limits of said land, to his knowledge, any placer, cement, gravel, or other valuable mineral deposits; [that no portion of said land is claimed for mining purposes under the local customs or rules of miners or otherwise;] that no portion of said land is worked for mineral during any part of the year by any person or persons; that said land is essentially non-mineral land, and that the application therefor is not made for the purpose of fraudulently obtaining title to mineral land, but with the object of securing said land for agricultural purposes, *so far as deponent knows;* and that the above and foregoing statements as to the character of said land apply to each and every legal subdivision thereof, and that his post-office address is ——"

Before making his selection, Clarke had applied to the register of the land office at Visalia for information as to vacant lands open to settlement, and was officially informed by him that the lands in question were such, according to the books and records in his office. Soon after his selection, however, and the filing of the application papers, a company known as the Kern Oil Company, on February 6, 1900, filed a protest against the selection, supported by affidavits to the effect that it and its predecessors in interest were at the time of the selection, and had continuously been, and at the time of the protest were, in the possession and occupation of the lands in question, working them under certain placer mining locations made on June 11, 1899; that the lands were valueless for agricultural purposes, but valuable for deposits of petroleum oil contained therein; and that Clarke well knew the mineral character of the land when he made his selection, and that the selection on his part was an attempt fraudulently to obtain title to mineral lands.

On February 12, 1900, one J. F. Ellwood and others filed separate protests against Clarke's selection, alleging possession and occupancy of the land by themselves for oil-mining purposes, substantially to the same effect as the Kern Oil Company.

When these protests were filed in the land office at Visalia, the contest raised by them was transferred to the General Land Office

in this city. Clarke moved to dismiss the protests on the ground that they were insufficient to raise a contest; but this motion was denied, and the Commissioner of the General Land Office proceeded to consider the application, the protests, and the affidavits on both sides. Upon consideration of them he determined "that inasmuch as the selections had not yet been approved by the Land Department and consequently the lands embraced therein had remained open to occupancy or exploration for minerals, evidence with respect to their present condition and as to whether vacant or unoccupied, and with respect to their present character as to whether known to contain valuable mineral deposits or not, should be taken and received for the purpose of determining whether or not the said selections should be approved": and accordingly he ordered an investigation to be had and a hearing given to the parties.

Appeal was taken by Clarke from this decision of the Commissioner to the Secretary of the Interior. Upon the appeal the Secretary held that, by the failure of Clarke at the time of making his application to show by proper averments that the lands were open to settlement and that he was entitled to make the selection, the lands remained thereafter the property of the United States open to exploration for mining purposes and for entry thereon under the mining laws; and that, inasmuch as, while the lands so remained open for exploration, the protestants had gone upon the lands and occupied them and made discovery of petroleum therein, and were working the same, and it became known and was acknowledged that the lands were valuable for minerals and worthless for agricultural purposes, the selection made by Clarke should be disapproved and rejected.

A motion for review of this decision was filed; and while this motion was pending and unacted upon, affidavits of the non-mineral character and non-occupancy of the land were filed on behalf of Clarke, which were apparently sufficient, if filed in time, to comply with the requirements of the regulations of the Land Office, and apparently would have been accepted by the office as *prima facie* sufficient at that time. But in determining the motion for a review the Secretary held that they came too late; and he affirmed his previous decision adverse to the claims of Clarke. This final decision was rendered on June 5, 1901.

On April 16, 1902, the relator caused the petition in this case to be filed in the supreme court of the District of Columbia for a mandamus to require the Secretary of the Interior to vacate his order rejecting Clarke's selection, to reinstate the proceedings, and to order a patent to be issued upon and in pursuance of Clarke's selections. A rule to show cause was issued; and the Secretary made return to the rule, and answered the allegations of the relator's petition. From the answer and the petition the facts herein stated have been taken. The respondent in his return claimed that his action was legal, that he was vested with discretion in the premises, and that, in the due exercise of such judgment and discretion, he had decided that Clarke was not entitled to a patent for the land selected by him.

To this return the petitioner demurred; and thereupon the cause was heard.

The court below overruled the demurrer. A motion for rehearing was entered: a rehearing was had; and again the demurrer was overruled. The petitioner having elected to stand by the demurrer, the court adjudged that the rule to show cause should be discharged, the prayers of the petition denied, and the petition itself dismissed. From the order of dismissal the present appeal has been taken.

The controversy is in fact, although not in form, one between rival claimants of the same tract of land. The relator claims it under a selection made in pursuance of the act of Congress of June 4, 1897. The parties who filed protests against it, claim under locations and entry made by them in pursuance of the act of Congress of February 11, 1897, (29 Stat. 526), entitled "An act to authorize the entry and patenting of lands, containing petroleum and other mineral oils, under the placer mining laws of the United States," and which provided:

"That any person authorized to enter lands under the mining laws of the United States may enter and obtain patent to lands containing petroleum or other mineral oils, and chiefly valuable therefor, under the provisions of the laws relating to placer mineral claims: *Provided* That lands containing such petroleum or other mineral oils which have heretofore been filed upon, claimed, or improved as mineral, but not yet patented, may be held and patented under the provisions of this act the same as if such filing, claim or improvements were subsequent to the date of the passage hereof."

The location and entry made by these latter parties are alleged to have been made on June 11, 1899, which antedated the relator's selection by upwards of six months; and they claimed to have sunk wells and found petroleum deposits within a short time thereafter. The action of these locators is claimed by the relator to have been fraudulent, and their assertion of right in the present case to be vague and insufficient.

But here was evidently a question for the Land Department of the Government to settle. We deem it wholly unnecessary for us to follow counsel in their elaborate arguments upon the merits of it: for if the nature and character of the controversy were, as we think they were, such as are remitted by law to the arbitrament and determination of the Land Office, the courts of this District have no authority to review the decision, or to control it, by means of the writ of mandamus, whether it was right or wrong. The writ of mandamus, it is well settled, cannot be used to serve the purpose of an appeal or writ of error; nor can it be used to control the exercise of judicial discretion. It has been used in recent cases to control the action of executive officers of the Government, when, having exhausted their judicial discretion, they have denied without legal cause the just legal rights of private persons. But in our opinion no such case is presented here. The case which is presented is this:

In his undoubted legal right under the statute Clarke selected the lands in question, in lieu of those which he had surrendered, as

"vacant land open to settlement," having first ascertained from the register of the local land office that they were carried on his books of record as such; and he made application for a patent for them. In the view which we take of this case, it is probably of no consequence that the selector was required without warrant of law to accompany his application with an affidavit to the effect that the land was unoccupied and non-mineral in character, when the law required nothing of the kind from him (*Whitney vs. Taylor*, 158 U.S. 85). It became the right, and probably it was the duty of the Land Office to investigate the condition of the land and to ascertain whether such condition remained in fact what it purported to be on the records of the office. For these records are not conclusive either upon the relator or upon the United States. There might be matters *in pais*, mining claims, or other claims, not necessarily matters of record, and yet which might suffice to show that the land had been taken by individuals and was no longer open to settlement. Especially did it become the right and the duty of the Land Office, when notice of previous entry by other parties under another and equally effective statute, was given to it by the protests filed by such parties.

It is of no consequence here whether those protests were sufficient as a basis for a formal contest between the parties. They may have been vague, irregular, fraudulent, wholly without valid foundation in law. But they were presented to the office, and they tended to show that the land in question was not "vacant land open to settlement;" for it could not have been open to settlement if it had already been settled on under form of law by other parties.

What was said by the Supreme Court of the United States by Mr. Justice Field, in the case of *Barden vs. Northern Pacific Railway Co.* (154 U. S. 288, 326), is entirely appropriate here. There it was said:

"The law places under the supervision of the Interior Department and its subordinate officers, acting under its direction, the control of all matters affecting the disposition of public lands of the United States, and the adjustment of private claims to them under the legislation of Congress. It can hear contestants and decide upon the respective merits of their claims. It can investigate and settle the contentions of all persons with respect to such claims. It can hear evidence upon and determine the character of lands to which different parties assert a right; and when the controversy before it is fully considered and ended, it can issue to the rightful claimant the patent provided by law, specifying that the lands are of the character for which a patent is authorized. It can thus determine whether the lands called for are swamp lands, timber lands, agricultural lands, or mineral lands, and so designate them in the patent which it issues. * * * It is the established doctrine, expressed in numerous decisions of this court, that whenever Congress has provided for the disposition of any portion of the public lands of a particular character, and authorizes the officers of the Land Office to issue a patent for such land upon ascertainment of certain facts, that department has jurisdiction to inquire into and determine as to the

existence of those facts, and in the absence of fraud, imposition, or mistake, its determination is conclusive against collateral attack."

Appropriate also is what was said by the same court in the case of *Steele vs. Smelting Co.*, 106 U. S. 447, 450, where the jurisdiction of the Land Office is thus stated :—

"The Land Department, as we have repeatedly said, was established to supervise various proceedings whereby a conveyance of the title from the United States to portions of the public domain is obtained, and to see that the requirements of different acts of Congress are fully complied with. Necessarily, therefore, it must consider and pass upon the qualification of the applicant, the acts he has performed to secure the title, the nature of the land, and whether it is of the class which is open to sale. Its judgment upon these matters is that of a special tribunal, and is unassailable except by direct proceedings for its annulment or limitation."

Upon these authorities, it is very clear that, if there was here a contest between different claimants of the land, the Land Office had jurisdiction to adjudicate and determine the contest; and that, if there was no formal contest between rival claimants, yet it was still within the jurisdiction of the Land Office, in view of the protests that had been filed and of the proof that was taken, to determine whether the land selected by Clarke was "vacant land open to settlement." If it decided the controversy erroneously, if it made a mistake in its definition of what constituted "vacant land open to settlement," if it attached undue value to the protests, if it failed to inform itself fully in regard to all the circumstances, yet, as the case was within its jurisdiction, such considerations cannot be inquired into or reviewed in a collateral proceeding, least of all, in a proceeding for the writ of mandamus, the use of which is limited to the enforcement of a merely ministerial duty and to the protection of a plain, admitted, and unquestioned legal right that has been arbitrarily or without due warrant of law denied.

We express no opinion as to the merits of this case, or as to the correctness of the decision reached in it by the Secretary of the Interior. It would be improper for us to do so in the view which we take of it. It appearing very clearly to us that it is of the class o cases remitted to the judicial discretion of the Land Office and Secretary of the Interior, we do not think that it is one proper for the issue of the writ of mandamus; and we are of opinion that the court below rightly so decided.

The order appealed from will be affirmed, with costs. And it is so ordered.

TUESDAY, *February 3d, A. D.* 1903.

THE UNITED STATES OF AMERICA on the Relation of the Riverside Oil Company, a Corporation, Appellant, *vs.* ETHAN A. HITCHCOCK, Secretary of the Interior.	No. 1264, January Term, 1903.

Appeal from the supreme court of the District of Columbia.

This cause came on to be heard on the transcript of the record from the supreme court of the District of Columbia, and was argued by counsel. On consideration whereof, it is now here ordered and adjudged by this court that the order of the said supreme court, in this cause be, and the same is hereby, affirmed with costs.

Per MR. JUSTICE MORRIS.

February 3, 1903.

In the Court of Appeals of the District of Columbia, January Term, 1903.

U. S. *ex Rel.* RIVERSIDE OIL CO., Appellant, *vs.* ETHAN A. HITCHCOCK, Appellee.	No. 1264. No. 10, Special Calendar.

Now at this time comes the plaintiff in error herein and petitions this honorable court to grant to it a writ of error in said cause to remove the same to the Supreme Court of the United States, and for cause shows that the amount involved is over ten thousand dollars and assigns the following errors committed by this honorable court:

First. The court erred in affirming the judgment of the supreme court of the District of Columbia.

Second. The court erred in affirming the judgment of the supreme court of the District of Columbia in dismissing the petition for a mandamus.

Third. The court erred in affirming the judgment of the supreme court of the District of Columbia in rendering judgment in said cause for defendant.

Fourth. The court erred in not reversing the judgment of the supreme court of the District of Columbia and sustaining the petitioner's demurrer to the defendant's answer.

Fifth. The court erred in not reversing the judgment of the supreme court of the District of Columbia and directing the writ of mandamus to issue to the defendant commanding him to pass the selections in question to patent.

Sixth. The court erred in holding that defendant did not act arbitrarily in refusing an order for a patent to plaintiff in error.

Seventh. The court erred in holding that after the selections had been made and the certificates given by the local land office, jurisdiction existed in the Secretary of the Interior to refuse a patent to plaintiff in error on the record in this case.

Eighth. The court erred in deciding that there was any discretion in the Secretary of the Interior on the record in this case to withhold a patent from plaintiff in error.

Ninth. The court erred in not holding that the equitable title to the land in controversy vested in the selector at the time, and as the result, of selection and relinquishment and that thereafter a ministerial duty only rested on the defendant to deliver to plaintiff in error a patent for said lands.

Tenth. The court erred in ignoring the certificates of the register and received and their legal conclusiveness, which certificates are in words and figures, as follows, to wit:

LAND OFFICE AT VISALIA, CALIF., *Dec.* 14, 1899.

I, Geo. W. Stewart register of the land office, do hereby certify that the land above selected, in lieu of land relinquished to the United States, is free from conflict, and that there is no adverse filing entry, or claim thereto.

GEO. W. STEWART, *Register.*

Eleventh. The court erred in not giving effect to the pleadings and in not giving plaintiff in error the benefit of the admissions made therein.

Twelfth. The court erred in withholding from plaintiff the benefit of the records of the land office, the act of March 3, 1883, and the legal effect of the instructions of the Land Department to its officers to furnish information in respect to vacant land, which instruction reads as follows:

"Any proper information regarding vacant public land may be obtained by application at any of the land officers, a list of which will be found on page 270" (Regulations of the Land Department, July 11, 1899).

Thirteenth. The court erred in its construction of the act of June 4, 1897, in not applying to the said statute the doctrines and principles of law which govern exchanges of land as distinguished from the doctrines applicable to the acquisition of the public land under other statutes.

Fourteenth. The court erred in holding that the defendant set up the defense that he had held that the selected land was closed to settlement because of acts of protestants.

Fifteenth. The court erred in holding as a fact in the case that the defendant had held that the selected land was closed to settlement at the time of selection by reason of the alleged acts of the protestants.

Sixteenth. The court erred in considering or giving any legal effect to the *ex parte* papers filed in the case called protests.

Seventeenth. The court erred in holding that there was any evi-

dence that at the time of selection the selected land was not vacant land open to settlement.

Eighteenth. The court erred in holding that the protestants were contestants or parties to any controversy with the selector in the Land Department or in anywise interested in this case or that there was any contest raised by the protestants in the Land Department over the title to the land described in the petition.

Nineteenth. The court erred in holding that the protestant had lawfully located or in anywise applied to enter the land in controversy or had any right thereto or made any claim thereto of which the Land Department could take cognizance prior to the selection thereof by the selector Clarke.

Twentieth. The court erred in considering or giving any effect to the *ex parte* adverse affidavits filed in the records in this case after the selection had been recorded.

Twenty-first. The court erred in giving effect to supposed local rules and regulations of miners in the absence of any allegation or proof of any such rules and regulations.

Twenty-second. The court erred in giving any effect to the alleged notices of location alleged to have been filed in the office of the county clerk or recorder.

Wherefore, plaintiff prays that its assignment of errors be filed in this court and that a writ of error to remove the cause to the Supreme Court of the United States be granted to the end that the judgment of this court may be reversed and that the writ of mandamus may issue as prayed for in the petition and that the plaintiff in error may have all proper relief.

SHIRLEY C. WARD,
JEFFERSON CHANDLER,
JOHN M. THURSTON,
W. C. PRENTISS,
Attorneys for Plaintiff in Error.

(Endorsed:) No. 1264. U. S. *ex rel.* Riverside Oil Co., appellant, *vs.* Ethan A. Hitchcock, Sec'y &c. Petition for writ of error and assignment of errors. Court of Appeals, District of Columbia. Filed Feb. 12, 1903. Robert Willett, clerk.

TUESDAY, *February 17th, A. D.* 1903.

THE UNITED STATES OF AMERICA on the Relation of the Riverside Oil Company, a Corporation, Appellant,
vs.
ETHAN A. HITCHCOCK, Secretary of the Interior.
} No. 1264.

On motion of Mr. W. C. Prentiss of counsel for the appellant, it is ordered by the court that a writ of error to remove this cause to the Supreme Court of the United States issue, and the bond is fixed at the sum of three hundred dollars.

UNITED STATES OF AMERICA, *ss*:

The President of the United States to the honorable the justices of the Court of Appeals of the District of Columbia, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said Court of Appeals before you, or some of you, between The United States of America, on the relation of the Riverside Oil Company, a corporation, appellant and Ethan A. Hitchcock, Secretary of the Interior, appellee, a manifest error hath happened, to the great damage of the said appellant as by its complaint appears. We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same in the said Supreme Court at Washington, within 30 days from the date hereof, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, the 17th day of February, in the year of our Lord one thousand nine hundred and three.

Seal Court of Appeals, District of Columbia.

ROBERT WILLETT,
Clerk of the Court of Appeals of the District of Columbia.

(*Bond on Writ of Error.*)

Know all men by these presents, that we, Riverside Oil Company, a corporation, as principal, and Citizens' Trust and Guaranty Company of West Virginia, as surety, are held and firmly bound unto Ethan A. Hitchcock in the full and just sum of three hundred dollars to be paid to the said Ethan A. Hitchcock, his certain attorney, executors, administrators, or assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents.

Sealed with our seals and dated this ninth day of March, in the year of our Lord one thousand nine hundred and three.

Whereas, lately at a Court of Appeals of the District of Columbia, in a suit depending in said court, between The United States upon the relation of said Riverside Oil Company, as appellants, and the said Ethan A. Hitchcock, as appellee, a judgment was rendered against the said The United States and the said relator *and the said relator*, in the name of the United States having obtained a writ of error and filed a copy thereof in the clerk's office of the said court to reverse the judgment in the aforesaid suit, and a citation directed

to the said Ethan A. Hitchcock, citing and admonishing him to be and appear at a Supreme Court of the United States, to be holden at Washington, within thirty days from the date thereof:

Now, the condition of the above obligation is such, that if the said Riverside Oil Company, in the name of the United States or otherwise shall prosecute said writ of error to effect, and answer all damages and costs if it fail to make its plea good, then the above obligation to be void; else to remain in full force and virtue.

[Seal of Riverside Oil Co.]

RIVERSIDE OIL CO.,
By J. R. JOHNSTON, *Pres't.*
CITIZENS' TRUST & GUARANTY CO. OF W. VA.,
By WILLOUGHBY S. CHESLEY,
Attorney-in-fact.

[Seal of Citizens' Trust & Guaranty Co. of West Virginia.]

Sealed and delivered in the presence of—
WILLIAM C. PRENTISS.

O K.
BEACH, *D. A.*

Approved by—
R. H. ALVEY,
Chief Justice, Court of Appeals of the District of Columbia.

[Endorsed:] No. 1264. The U. S. of A. on the relation of the Riverside Oil Company, a corporation, appellant, *vs.* Ethan A. Hitchcock, Secretary of the Interior. Bond on writ of error to Supreme Court of the U. S. Court of Appeals, District of Columbia. Filed March 10, 1903. Robert Willett, clerk.

UNITED STATES OF AMERICA, *ss:*

To Ethan A. Hitchcock, Secretary of the Interior, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, at Washington, within 30 days from the date hereof, pursuant to a writ of error, filed in the clerk's office of the Court of Appeals of the District of Columbia, wherein The United States of America, on the relation of The Riverside Oil Company, a corporation is plaintiff in error, and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness, the Honorable R. H. Alvey, Chief Justice of the Court of

Appeals of the District of Columbia, this 10th day of March, in the year of our Lord one thousand nine hundred and three.

R. H. ALVEY,
Chief Justice of the Court of Appeals of the District of Columbia.

Service accepted, March 10, 1903.

MORGAN H. BEACH,
U. S. Dist. Att'y, D. C.

[Endorsed:] Court of Appeals, District of Columbia. Filed Mar. 10, 1903. Robert Willett, clerk.

Court of Appeals of the District of Columbia.

I, Robert Willett, clerk of the Court of Appeals of the District of Columbia, do hereby certify that the foregoing printed and typewritten pages, numbered from 1 to 155 inclusive, contain a true copy of the transcript of record and proceedings of said Court of Appeals in the case of The United States of America, on the relation of the Riverside Oil Company, a corporation, appellant *vs.* Ethan A. Hitchcock, Secretary of the Interior, No. 1264, January term, 1903, as the same remain upon the files and records of said Court of Appeals.

Seal Court of Appeals, District of Columbia.

In testimony whereof I hereunto subscribe my name and affix the seal of said Court of Appeals, at the city of Washington, this 11th day of March A. D. 1903.

ROBERT WILLETT,
Clerk of the Court of Appeals of the District of Columbia.

Endorsed on cover: File No. 18,860. District of Columbia Court of Appeals. Term No. 632. The United States of America on the relation of The Riverside Oil Company, plaintiff in error, *vs.* Ethan A. Hitchcock, Secretary of the Interior. Filed March 11th, 1903.

FILE COPY.

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Office Supreme Court U. S.
FILED
MAR 16 1903
JAMES H. McKENNEY,
Clerk.

In the Supreme Court of the United States.

OCTOBER TERM, 1902.

THE UNITED STATES EX REL. RIVERSIDE Oil Company, plaintiff in error,
v.
ETHAN A. HITCHCOCK, SECRETARY OF the Interior.
} No. 632.

IN ERROR TO THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA.

MOTION TO ADVANCE.

37095

In the Supreme Court of the United States.

OCTOBER TERM, 1902.

THE UNITED STATES EX REL. RIVERSIDE Oil Company, plaintiff in error, *v.* ETHAN A. HITCHCOCK, SECRETARY OF the Interior. } No. 632.

IN ERROR TO THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA.

MOTION TO ADVANCE.

This is a writ of error to review a judgment of the court of appeals of the District of Columbia affirming a judgment of the supreme court of the District of Columbia dismissing a petition for a writ of mandamus to require the Secretary of the Interior to reinstate and pass to patent certain selections of lands under the Forest Reserve Lieu Selection provision of the act of June 4, 1897 (30 Stat., 36), which the Secretary of the Interior had rejected for causes stated in his decisions of April 25, 1901, and April 12, 1902, on review.

The two principal questions presented by the record are:

First. Whether, in the absence of any action of the Land Department divesting the legal title of the

United States to the land in question, the courts of the District of Columbia have the power to review the decision of the Secretary of the Interior by the writ of mandamus.

Second. Whether, if such power to review exists, the action of the Secretary in this instance is subject to review and control by the writ of mandamus.

The second question involves an inquiry into the meaning and application of the act of June 4, *supra*, and the authority of the Land Department to require proofs of the condition and character of the land sought to be selected as an essential element of a selection under the act, and to hold that until such proof is made the selector has not brought himself within the operation of the act.

The matters thus embraced within this second question, it is understood, are partly involved and will be argued in cases numbers 217 and 218 on the docket for the present term, which are controversies between certain selectors under the said act of 1897, and mineral claimants in possession of the land sought to be selected, to which controversies neither the United States nor the Secretary of the Interior is a party.

These questions are of great public interest, and as the construction and ruling of the Land Department complained of are an expression of the present settled policy of the Department with respect to the administration of the act of 1897, and many cases have already been disposed of in accordance with such ruling and many others are now pending, it is important that the

question of the power of the courts of the District of Columbia to interfere with such ruling by the writ of mandamus shall be speedily and definitely determined, so that the future administration of this act may not be subject to doubt or uncertainty.

With the concurrence and at the request of counsel for the plaintiff in error, I therefore submit a motion to advance this case for hearing at this term. And inasmuch as a part of the inquiry here presented is involved in cases numbers 217 and 218, I respectfully submit that this case be set *not to be heard with such cases, but to follow them* in such wise that counsel for the Secretary of the Interior may be heard upon the question of the power of the courts, by the writ of mandamus to control his action in the administration of the act of 1897, and in such a proceeding to overturn the practice and rulings of the Department. It is believed that it will be helpful to the court and save time and labor to have this case and the other two under consideration at the same time.

HENRY M. HOYT,
Solicitor-General.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1902.

No.———

The United States of America, on the Relation of the Riverside Oil Company, a Corporation, Appellant,

vs.

Ethan A. Hitchcock, Secretary of the Interior.

Synopsis of Mandamus Record.

In order that the Court may at once and clearly see what the record of title of petitioner is and the statutes under which it is made, the attention of the Court is called to the statutes involved and the papers filed by Clarke, found in the record. The original statutes are as follows:

"That in cases in which a tract covered by an unperfected bona-fide claim or by a patent is included within the limits of a public forest reservation, the settler or owner thereof, may, if he desires to do so, relinquish the tract to the Government and may select in lieu thereof a tract of vacant land open to settlement not exceeding in area the tract covered by his claim or patent; and no charge shall be made in such cases for making the entry of record or issuing the patent to cover the tract

selected: *Provided, further*, That in cases of unperfected claims the requirements of the law respecting settlement, residence, improvements, and so forth, are complied with on the new claims, credit being allowed for the time spent on the relinquished claims." (Rec. pp. 5 and 6).

"That all selections of land made in lieu of a tract covered by an unperfected bona-fied claim, or by a patent, included within a public forest reservation, as provided in the act of June fourth, eighteen hundred and ninety-seven, * * * shall be confined to vacant surveyed non-mineral public lands which are subject to homestead entry, not exceeding in area the tract covered by such claim or patent: *Provided*, That nothing herein contained shall be construed to affect the rights of those who, previous to October first, nineteen hundred, shall have delivered to the United States, deeds for lands within forest reservations and make application for specific tracts of lands in lieu thereof." (Id. p. 6).

Statutes and regulations relating to the evidence of vacant land.

Be it enacted by the Senate and House of Representatives of the United States of America, in Congress assembled:

Sec. 2. That registers and receivers shall, upon application, furnish plates or diagrams of townships in their respective districts showing what lands are *vacant* and what lands are *taken*, and shall be allowed to receive compensation therefor from the party obtaining said plat or diagram at such rates as may be prescribed by the Commissioner of the General Land Office; and said officers shall, upon application by the proper State or Territorial authorities, furnish, for the purpose of taxation, a list of all lands sold in their respective districts, together with the names of the purchasers, and shall be allowed to receive compensation for the same not exceed ten cents per entry; and the sums thus received for plats and lists shall not be considered or taken into account in determining the maximum of compensation of said officers.

Approved March 3, 1883. (22 Stat., 484).

Regulations.

Any proper information regarding *vacant public lands* may be obtained by application at any of the land offices, a list of which will be found on page 270.

Land Department Circular, July 11, 1899, page 1.

102. No public land shall be withheld from entry as agricultural land on account of its mineral character, except such as is returned by the Surveyor General as mineral; and the presumption arising from such a return may be overcome by testimony taken in the manner hereinafter described. Sec. 28, p. 15, 616.

Record of Selection.

To the register and receiver, United States land Office, Visalia, California:

Gentlemen: In accordance with the provisions of an act of Congress, approved June 4th, 1897, entitled "An act making appropriations for sundry civil expenses of the Government for the fiscal year ending June 30, 1898, and for other purposes."

I, C. W. Clarke, of San Francisco, city and county, State of California, do hereby select and locate the following described tract of surveyed land, to wit:

The south half of the northeast quarter of section four (4) in township twenty-nine (29) south, range twenty-eight (28) east of Mount Diablo meridian, containing eighty (80) acres.

In lieu of

The southwest quarter of the southwest quarter of section sixteen (16) in township twenty-one (21) south, range seven (7) east; and the southwest quarter of the southwest quarter of section thirty-six (36) in township thirty-seven (37) south, range five (5) east of Willamette meridian, containing eighty (80) acres.

The said last-mentioned tract is included within the limits of the Cascade Range forest reservation in Oregon, and being the owner, and desiring to select other land in lieu of said tract, I made and executed deeds of reconveyance thereof to the United States, on May 5th, 1899, and October 28, 1898, respectively 1899, as pro-

vided by the said act of June 4, 1897, which said deed has been recorded in the proper county and State. I therefore ask that a United States patent issue to me for the land hereby selected.

Witness my hand this 13th day of December, 1899.

C. W. CLARKE,
Post Office Address, care of F. A. HYDE,
415 Montgomery St., San Francisco, Cal.

This paper was supposed by the petitioner to be in compliance with section 2355 of the Revised Statutes of the United States, reading as follows:

Sec. 2355. Every person making application at any of the land offices of the United States for the purchase at private sale of a tract of land, shall produce to the register a memorandum in writing, describing the tract, which he shall enter by the proper number of the section, half-section, quarter-section, half-quarter-section, or quarter-quarter-section, as the case may be, and of the township and range, subscribing his name thereto, which memorandum the register shall file and preserve in his office.

As a result of the first paper filed by Clarke, George W. Steward, Register of the Land Office, certified, page ten of the record, that the land above selected in lieu of land relinquished to the United States, is free from conflict, and that there is no adverse entry, filing or claim thereto. The selections were accompanied by an affidavit of A. Barion, made on the 13th of December, 1899, found on pages twenty-three and twenty-four of the record, which reads as follows:—

U. S. LAND OFFICE,
Visalia, California.

A. Barion, being duly sworn according to law, deposes and says: That he is over the age of twenty-one years, a citizen of the United States and of the State of Cali-

fornia, and a surveyor by occupation, and is well acquainted with the character of the following described land, and with each and every legal subdivision thereof, to wit:

The south half of the northeast quarter of section four (4) in township twenty-nine (29) south, range twenty-eight (28) east, of Mount Diablo meridian, containing eighty (80) acres.

* * * * * *

That the tract applied for is agricultural in character, and contains no known deposits of coal or other minerals, and is not subject to entry under the coal or mineral land laws of the United States.

This affidavit is made upon the evidence found on the surface of the ground; deponent does not undertake to express any opinion as to what may be under the ground.

That he has frequently passed over the same and his personal knowledge of said land is such as to enable him to testify understandingly in regard thereto; that there is not, to his knowledge, within the limits thereof, any vein or lode of quartz or other rock in place, bearing gold, silver, cinnabar, lead, tin or copper, or any deposit of of coal; that there is not within the limits of said land, to to his knowledge, any placer,cement, gravel or other valuable mineral deposit; * * * that no portion of said land worked for mineral during any part of the year by any person or persons; that said land is essentially nonmineral land, and that the application therefor is not made for the purpose of fraudulently obtaining title to mineral land, but with the object of securing said land for agricultural purposes, so far as deponent knows, and that the above and foregoing statements as to the character of said land apply to each and every legal subdivision thereof, and that his post-office address is 420 California Street, San Francisco, California.

A. BARION.

Whereupon the register transmitted the papers to Washington in the following language, page twenty-six of record.

UNITED STATES LAND OFFICE,
Visalia, California, January 22, 1900.

Honorable Commissioner General Land Office, Washington, D. C.

Sir: I transmit herewith the application of C. W. Clarke to select, under the act of June 4, 1897, the N. ½ of S. E. ¼ sec. 4, T. 29 S., R. 28 E., M. D. M.

I also transmit herewith * * * the affidavit of A. Barion as to the character of the land selected.

In re deed from C. W. Clarke and wife to the United States of tract surrendered and abstract of title thereto, see note on back of enclosed application.

The records of this office show the land selected to be free from conflict and subject to such selection.

Publication is ordered under circular of December 18, 1899. Very respectfully,

GEO. M. STEWART, Register.

The affidavit was accepted by the register as sufficient to comply with any rules then known to exist. The said Clarke had no notice of any other requirement; the selection was satisfactory to the register and receiver.

Afterwards, the selection came before the Commissioner for consideration, as seen on page 57 to 71, inclusive. In the opinion of the Commissioner of the General Land Office, bottom of page 59, top of page 60, the proof presented by Clarke was deemed sufficient. Commissioner saying, as above stated, regulations were prescribed for claimants seeking the benefit of said act of June 4, 1897, *supra*, which required the submission of certain proof. This proof (speaking of the affidavit filed) has been furnished in these cases. In addition to this a non-mineral affidavit accompanies all selections. The decision of the Commissioner, was appealed from,

and on said appeal vacated. See bottom of page 97—opinion of the Secretary of the Interior. The Secretary of the Interior held that the affidavit of Barion, filed by Clarke, was not sufficient, and for that reason, *alone*, rejected the selection. The decision of the Secretary vacating the decision of the Commissioner, and holding that the affidavit of Barion filed by Clarke was not sufficient, was rendered on the 25th day of April, 1901.

Whereupon as quick as it could be done, and as soon as Clarke was notified that the affidavit was not in the opinion of the Secretary sufficient, a new affidavit was made curing the defects in the original affidavit. This new affidavit is found on pages 103-4 of the mandamus record, and was made on the 29th day of May, 1901. These papers constitute the record of selection of the land in controversy and include a compliance with section 2355 of the R. S. supra, fixing the only *form* of selection of public land under the law of June 4, 1897. These papers were all accepted by the register and receiver and Commissioner, and were declared as above stated to be sufficient. As quick, however, as the Secretary held the affidavit insufficient a new one curing the alleged defects was promptly made and filed.

SECOND DIVISION OF THE RECORD. For fifty-eight days after the selection and approval thereof by the register and receiver, no papers were filed in the case by any one. The selections were made on the 8th and 13th day of December, 1899. On the 10th day of February protests were made against the selection, in which it

is stated, among other things, that the protestants had purchased from certain alleged locators of placer claims on the land in controversy their alleged rights, whatever they were, and stating further that the land selected was "*mineral in character*," which statement amounts to nothing in the face of Rule 102, supra, found on page 610 of 28 L. D., which reads as follows:

"No public land shall be withheld from entry as agricultural land on account of its mineral character except such as is returned by the Surveyor General as mineral."

Said protest made fifty-eight days after selection prayed, page 44, that the proceedings relating to said application (speaking of the selection) be suspended until *further developments* and operations shall have further demonstrated the *mineral character* and productive capacity of the same for mineral purposes. This protest was filed, page 45, on the 10th of February, 1900. On page 51 of the same record, same prayer to another protest is found in the same language, also filed on February 10th, 1900. These protests do not show or claim any discovery of mineral, if oils be a mineral, nor did they show that a drop of oil had been taken from the property at the time the protests were filed. Accompanying the protests were notices that the alleged grantors of protestants had filed in the County Clerk's Office, a certain notice, which paper does not state that there were any rules of miners prevailing in respect of any of the matters contained in the notice, nor does the record anywhere state the existence of such rules, and

this Court will take judicial notice that there were no such rules in California. The laws of California have abolished all state rules of miners. The said notices of location, stated no discovery of oil. The said protests, put on file fifty-eight days after the selection, constitute the adverse protest record, if these papers may be called a record, against the selection. No contest was initiated under the rules of practice in the land department, as is shown elsewhere in this analysis These papers are simply put into the case by protestants and remain there as dead matter.

THE THIRD DIVISION OF THE RECORD embraces what was done by the Department on these several statutes and papers. As said above, the register and receiver *accepted* the selection, and if any affidavit was required, which is denied, accepted the affidavit of Barion as sufficient. Pages 23 and 24 of mandamus record. For fifty-eight days this record lay unassailed, and if the Land Office had been abreast of its business the patent would have been issued in the meantime. The Commissioner of General Land Office, when the record reached him for action, held that the affidavit of Barion was sufficient (see pages 59–60 of the mandamus record); but the Commissioner also held, page 64, that "under this ruling, the land in these selections mentioned is open to exploration under the mining laws until his approval of the selection, and if at this date of his opinion, December 18, 1900, one year and five days after selection, the lands are shown to contain oil, such showing would defeat the selection." It will be seen that the Commis-

sioner held, that the record of the selector, standing alone, was adequate to vest title to the land selected in the selector, but held further, on page 64 of the mandamus record, and at the bottom thereof, that "the presumption in favor of the selection arising from the character of the tract as shown by the records of the local land office, is *weakened* by the affidavits of the mineral claimants to the contrary, especially as that presumption rests upon the affidavit of Barion." It will be seen that the Commissioner held the record of selection to be good, but ordered a hearing to inquire into the character of the land at the date of selection, on a special officer's report, which is not evidence, holding on page 71 of the record, that unless the selector asked for a hearing within thirty days, his selection would be cancelled without any proof to overthrow it. The Commissioner says that a failure to apply for such hearing (on the part of the selector) within a prescribed time, will be taken as an admission of the truth of the charges. No charges were ever made. This decision of the Commissioner was appealed from, and the appeal decided on the 25th of April, 1901. The order of the Commissioner for a hearing was *vacated*. Page 97, at the bottom thereof. Under the practice in the Land Department, a subordinate officer is required to pass upon all aspects of the case before him, to the end that there may not be several appeals taken from time to time. Under this rule of practice the Commissioner decided that the selection was adequate, and that the proof of it was adequate, but that the protest affidavits, though no proof in them-

selves, *weakened* the proof which was adequate in the absence of such affidavits, and therefore ordered the selector to apply for a hearing or forfeit his selection. He ordered the selector to appear before the register and receiver, within thirty days after notice, and ask for a hearing, and in the event of his failure to ask for a hearing, the record of the selection was to be cancelled without inquiry.

Under the same rule of practice governing the land department the Secretary is required to pass upon all questions in the record to avoid a return of the case on undetermined issues. He therefore did decide all questions in the case. He vacated the order of the Commissioner for a hearing and placed his decision against the selection solely on the ground (page 97 of the record,) that the affidavit of Barion was insufficient; "the proof presented by the selector did not *show*, so he says, that the land was subject to selection, and would not justify the issuance of a patent, even if no protests had been filed." In this decision the Secretary passed upon all questions involved in the case, as he was required to do under the rules of practice of his department.

Turner *vs.* Robinson, 3 L. D., 562.

Lawrence *vs.* Seeger, 25 L. D., 377.

He rejected the selection on the *single ground* that the affidavit of Barion did not *negative* the occupancy of the selected land at the time of selection. This is the sole reason given by him for rejecting the selection. He held, as stated above, that even if there were no protests filed, the defects in the affidavit in the respect mentioned

was jurisdictional and defeated the selection. The Secretary is bound by his reason given Merrill on Mandamus, sec. 40, page 42.

A motion for review was made on this decision, which motion was overruled. The second decision on review was rendered April 12, 1902. In the meantime, as quick as could be done after the first decision, a non-occupancy affidavit was filed (see page 103-4 of record) to cure any defect in the first affidavit, which was acceptable to the register and receiver, and to the Commissioner of the General Land Office. The second affidavit was held by the Secretary to be too *late*, and on page 125 of the record in the mandamus case, he re-affirmed his decision on appeal from the Commissioner, and said that selector had failed to comply with the requirements of the *land office* and to furnish the proof in addition to record proof necessary to *validate* the said attempted selection or to enable the Land Department to issue any patent therefor or to invest in him, the said Clarke, *any right* to the same, and that in consequence of such *failure*, the lands remained the property of the United States and were open to exploration for mining purposes. And inasmuch as it appears that the protestants had gone into possession and occupancy thereof, and had made subsequent discovery of petroleum oil therein (the fact of subsequent discovery was admitted in the petition), and inasmuch as before the said requirements and conditions had been complied with (that is filing a new affidavit) to wit, April 25, 1901 (one year and four months after the selection), discovery was made, the selection was, therefore, and for

that reason rejected. In the last utterances of the opinion, found on page 127 of record in mandamus case in his return to the petition for mandamus, the Secretary says, "This respondent held and *decided* that by *reason* of the *failure* of said Clarke to *show* in due and proper form that the said lands were at the date of said selection subject to selection, was vacant lands open to selections, the attempted selection thereof must be rejected. In E. C. Stimpson, 15 L. D., it is held that an affidavit is no part of a selection.

It will be kept in mind that the return to the petition for mandamus admitted the allegations of the petition for mandamus not denied. These allegations were (page 12 of record) that at the time of said selections by said Clarke no person or persons had any right, title or interest either vested or inchoate in or to said lands so selected by said Clarke; that no discoveries of mineral had been made on said land; that the protestants themselves never staked off any claims for land. On page 17—

"Your petitioner alleges that there was no person present on the selected land at the date of selection. Your petitioner also alleges that no claim adverse to selector existed to said land at the date of selection; that the decision rests solely on the erroneous assumption of the Honorable Secretary of the Interior; that the words vacant land in the act of June 4, 1897, means land free from the presence thereon, actual or constructive, of any one whether claiming said selected land or not."

And on bottom of page 17 it is alleged—

"Your petitioner further alleges that all of the objections to the said selections set forth in said protests were on appeal considered, weighed and decided against and held for naught by the defendant, and the judgment

and findings of the Commis-ioner of the General Land Office and the order for a hearing on said protests were by the defendant reversed, overruled and vacated and judgment thereon on appeal rendered against said protests and protestants and in favor of the selector; but the defendant arbitrarily refuses to pass the said selections to patent, and has arbitrarily ordered the case of the said selections dismissed from his docket solely because of the alleged absence from the record of selection of a non-occupancy affidavit, and not because of any ground or cause of objection to the selections set up in said protests."

All this is admitted. On page 19 it appears in the petition for mandamus that the protestants entered upon the land selected in February, 1900, for the first time, and wrongfully, unlawfully and without the knowledge or consent of the said Clarke, or his grantee, entered into possession of the selected land, and have ever since held and do now wrongfully hold possession thereof and exclude the said Clarke and his grantees therefrom by intimidation and threats of violence, This allegation is admitted. Hence, it appears in the pleadings that the land was selected Dec. 13, 1899, on a record then satisfactory to the land department; that nearly two months afterwards the protestants without filing any claim in the land office and without making any claim of record to the land in dispute, and without itself locating the land or making discovery, violently took possession of it and held the same. All these allegations are admitted, and the decisions of the Secretary were put on the sole ground that the selection was *never valid* because of the absence of a non-occupancy affidavit though not required by any statute of the United States and really not required by any rule, although it will be claimed by defendant that

the regulations of the land department did require it. The regulation relied upon by defendant will be found set out in full on page 7 of record. At the bottom of the exhibit is this language: "An affidavit showing the land selected to be non-mineral in character and *unoccupied*" It is claimed by petitioner that the affidavit actually filed and accepted by the register and receiver and Commissioner was such an affidavit as was called for by this regulation. The regulation invokes an affidavit showing the land selected (which affidavit must necessarily be made after the selection) to be non-mineral in character and *unoccupied*. The statute of June 4 1897, does not use the word *unoccupied*. The *form* of the affidavit is not prescribed by this rule. It is not suggested in the rule itself what language shall be incorporated into a non-occupancy affidavit. Hence, if an affidavit be required at all, the contents thereof must necessarily be such as, in the judgment of the selector and the receiver administrating the rule, comply with the so-called regulation.

The affidavit of Barion, found on pages 23–4 of the record, complies with the rules, so far as the selector and the receiver and register and Commissioner could determine. As quick, however, as that affidavit was criticised by the Secretary, which was done for the first time on the 25th day of April, 1901, selector hastened to supply new affidavit, which is found on pages 103-4 of the record sworn to on the 29th day of May, about a month after it was required, which considering the distance to California and back was supplied with reasonable promptness

Effect of the Return.

A return to a writ of mandamus or an answer to a petition for the writ where the petition is made by statute, the first pleading, as is the case in the District of Columbia, must be certain, definite and explicit.

The return involves or rests upon the personal and official knowledge of the defendant, who alone is enabled to declare the grounds and reasons for his official action complained of. Being possessed of this perfect knowledge, the law requires him to explicitly state the grounds of his action. This requirement rests also upon a principle of public policy that an officer, when his conduct is called in question is required to disclose the reasons for that conduct, which are alone possessed by him.

The return should show a legal reason for not obeying the writ. King *vs.* York, 6 F. R. 490; Springfield *vs.* Handen, 10 Pick., 59. When a writ is traversed, facts must be positively and directly denied and the denial must be single and special as to any allegations intended to be controverted. A general denial in a return is a nullity at common law. When any new matters are relied upon, the return must positively, clearly and specifically set out the facts relative thereto so that the relator may be able to traverse them and the Court may be enabled to see at once whether if established they justify a disobedience of the writ.

When the respondent sets forth in his return matters in abatement and also matters in defence on the merits and asks judgments on the merits, he waives his pleading in abatement. Nothing will be intended in a return

A return is construed most strongly against the pleader.

Allegations in the writ not denied nor confessed and avoided are taken as true. Where officers were called upon to show cause why they refused to prove a bond given to procure a license to sell liquor and in their answer they decline to state their reasons for non-action, it was construed to be fair to assume that they acted arbitrarily and without reason. Merrill on Mandamus, Sections 274-5.

Railway Co. *vs.* McCarthy, 96 U. S., 267.

Where a party gives reason for his conduct and decision touching any thing involved in a controversy, he can not, after litigation has begun, change his ground, and put his conduct upon another and a different consideration. He is not permitted thus to mend his hold. He is stopped from doing it by a settled principle of law. Gold *vs.* Banks, 8 Wend. (N. Y.) 562; Holbrook *vs.* White, 24 id., 169; Everett *vs.* Saltus, 15 id., 474; Wright *vs.* Reed, 3 Durnf. and E. 554; Duffy *vs.* O'Donovan, 46 N. Y., 223; Winter *vs.* Coit, 71 id., 288.

Admission of Counsel for the Government.

On pages 131 to 133, inclusive of the record in the mandamus case, it will be seen that the Secretary of the Interior and his counsel admit that there was no claim of the protestants to the land to be considered in the case. On pages 131-2-3, of the record, appears a letter from the Secretary to the Chairman of the Committee on Public Lands of the House of Representatives, in which he he states that six United States Courts differ with him about the necessity of any affidavit at all, or the right to

exact one from the selector, inasmuch as it was not required by statute, and asks for an act of Congress requiring such an affidavit. At the bottom of page 133 counsel for the Government and for the defendant in the mandamus proceedings, admits in explicit terms that there was no contest in the case in the land department or in the Court, and the sole issue in the case was between the petitioner and the United States. It would seem therefore clear from quotations from the record that the only ground of controversy in the mandamus case is as follows: First. That by reason of the failure to make an affidavit of non-occupany of the land selected at the time of selection, satisfactory in its expressions to the Secretary of the Interior, he held that the selection was never made, was never brought within the jurisdiction of his department to decide; that the selection was void on its face, independent of the protests. Second. That the selection being void, the record of selection did not operate to seggregate the land selected from public land of the United States, and therefore the selected land was, notwithstanding the record of selection, still open to exploration for mineral oil, and said oil having been discovered within a year or more after the selection and before the second affidavit of Barion, dated May 29, 1901 a year and five months after the selection was filed; selector takes nothing by what he did, the result of which is that the Government retains the relinquished land and the selected land.

It will be kept in mind that the protestants have made no contest for a patent, nor do they propose to do so.

They refuse to give the department and the courts jurisdiction to pass upon their claim. Protestants stand alone upon their trespass. They do not propose to pay anything to the Government for the land they claim to possess as oil land. They wish to keep out of the department and out of the courts; to take the oil in the land, after which they will abandon it, without asserting any right on their part to it.

The proceedings in the land department at no time reached the stage of a contest.

Travis *vs.* Perry, 15 L. D., 23–25.

Nor was the non-occupany affidavit any part of the selection.

E. C. Stimson, 15 L. D., 255.

Bare possession no bar to selection, 30 L. D., 250.

A hearing will not be ordered unless made with intent to assert or acquire title thereto, which intent must be evidenced by an accompanying application to appropriate the land. 8 L. D., 30–31.

A certificate of location is not evidence of mineral. 28 L. D., 174; 17 L. D., 424. The existence of gold does not make the land in which it is contained mineral. It must be in *paying* quantities. 7 L. D., 71; 13 L. D., 86; 17 L. D., 424; 30 L. D., 327.

A mining location is not *prima facie* evidence that the land is mineral. 30 L. D., 442–49.

To transform a protestant into a contestant a change of attitude in the case must occur. A contestant must pay costs. 6 L. D., 765. Under the rules of the Land Department additional evidence may be filed in *ex parte*

cases at any stage of the case. Rule 100. The affidavit, pages 103 and 104, should have been considered mandamus record.

The Distinction between a Protest and a Contest is very clear under the Law and the Rules of Procedure of the Land Department.

A protest is simply an admonition to the Government by a letter or affidavit or telegram that the protestant will, if desired by the Government so to do, furnish evidence in favor of the Government of the character mentioned in the protest. Brewer, Judge, in 21 Fed. Rep. 21 Federal Reporter. A protestant takes nothing by a protest, and if the protest be decided against, that is the end of the protestant in that particular record.

The mere filing of the protests did not and could not initiate a contest is apparent upon reference to the Rules of Practice of the Land Department.

1. Initiation of Contests.

Rule 1.—Contests may be initiated by an adverse party or other person against a party to any entry, filing or other claim under laws of Congress relating to the public lands for any sufficient cause affecting the legality or validity of the claim.

Rule 2.—In every case of application for a hearing an affidavit must be filed by the contestant with the register and receiver, fully setting forth the facts which constitute the grounds of contest.

Rule 3.—Where an entry has been allowed and remains of record the affidavit of the contestant must be accompanied by the affidavits of one or more witnesses in support of the allegations made.

2. Hearings in Contested Cases.

Rule 4.—Registers and receivers may order hearings

in all cases wherein entry has not been perfected, and no certificate has been issued as a basis for patent.

Rule 5.—*In case of an entry or location on which final certificate has been issued, the hearing will be ordered only by direction of the Commissioner of the General Land Office.*

Rule 6.—*Applications for hearings under Rule 5 must be transmitted by the register and receiver, with special report and recommendation, to the Commissioner, for his determination and instructions.*

Notice of Contest.

Rule 7. At least thirty days' notice shall be given of all hearings before the register and receiver unless, by written consent, an earlier day shall be agreed upon.

Rule 8.—The notice of contest and hearing must conform to the following requirements:

1. It must be written or printed.
2. It must be signed by the register and receiver, or by one of them.
3. It must state the time and place of hearing.
4. It must describe the land involved.
5. It must state the register's and receiver's number of the entry and the land office where and the date when made, and the name of the party making the same.
6. It must give the name of the contestant and briefly state the grounds and purpose of the contest.
7. It may contain any other information pertinent to the contest.

It is thus apparent that, after a selection on which final certificate has been issued, as was the case here, a contest can be allowed or declared only by the Commissioner of the General Land Office, whose function is to determine upon the *ex parte* affidavits filed against an entry or selection, or other information which may be in his possession, whether sufficient showing for allowing or ordering a contest appears.

There is a great misapprehension of what constitutes a *contest*, how began and the legal import thereof. The Government, by the law of May 20, 1880, 27 Statutes at Large, 270, indicated that "in all cases where any person has contested, paid the land office fees and procured the cancellation of an improper homestead, or timber culture entry, he shall *have the preference right to buy*. This is a personal right not assignable. The right to contest under this statute is limited to entries mentioned in the act, to wit, preemption (which is now repealed) homestead, timber culture entry, or possibly desert land and other agricultural preliminary entries, made to initiate agricultural claims to land. It has no application to the case at bar. It does not embrace contests between mineral and agricultural claimants. The contestants, under the law of 1890, by breaking down the entry has for thirty days under this act the *preference right to buy the land*. He is rewarded as an informer. The practice which the land department has established in the execution of this statute (speaking of contests) declares that "in case of any entry or location on which final certificate has been issued the hearing will be ordered only by direction of the Commissioner of the General Land Office, page 1 of the Rules of Practice of the General Land Office. Rule 5 and by Rule 7 "at least thirty days' notice shall be given of all hearings before the register, unless by written consent an earlier day shall be agreed upon. Rule 8 declares page 8 of the Rules of Practice the NOTICE of contest and hearing must conform to the following

requirements. First, it must be written or printed. Second, it must be signed by the register and receiver, or by one of them. Third, it must state the time and place of hearing. Fourth, it must describe the land involved. Fifth, it must state the register and receiver's number of the entry and the land office where and the date when made and the name of the party making the same. Sixth, it must give the name of the contestant and briefly state the grounds and purpose of the contest. Seventh, it may contain any other information pertaining to the contest."

This notice is the summons and is jurisdictional. It will be seen that no such paper as that is in the record. No one can attack a record entry without a pleading and summons. 116 U. S. 52. It appears from the record that the order of the Commissioner for a hearing, made without any accusation against the selection, was vacated. In 27 L. D. page 555, Irwin *vs.* Hayden, the Secretary says: "The purpose of the rule requiring an affidavit of contest to be corroborated is to assure the Government of the good faith of the contestant and not that jurisdiction may be vested in the local officers, that being obtained by *service of notice only.*" It is not sufficient to set up occupany of the land even in a contest to entitle the party to a contest. "Possession and occupany of the land in contest, with intent to appropriate it under the timber culture laws, is not sufficient to except said land from the grant to the company contained in section 3 of the act of July 2, 1864, 13 Statutes at Large, 367." Timber culture claims

and rights can be initiated only by *entry* at the local land office and are not derived from antecedent occupancy, improvement and cultivation. Northern Pacific R. R. Co. *vs.* White, 452, 453. Jurisdiction does not vest in the Land Department to entertain a contest against an entry already allowed because of any statement, however strong, of a contestant, that he has a prior right to buy. There must be NOTICE (in the nature of a summons and pleading together) given, stating the FACTS above enumerated. On page 454, 19th L. D., in the case of Shugran *vs.* Dillman, Secretary Smith says "where an entry has been allowed and remains of record, the affidavit of the contestant must be accompanied by the affidavits of one or more witnesses in support of the allegations made. The purpose of the rule is to assure the Government of the good faith of the contestant and not that *jurisdiction* may be vested in the local officers, that being obtained *only* by service of notice. Houston *vs.* Coyle, 2 L. D., 58. Seitz *vs.* Wallace, 6 L. D., 299. No one can get a preference right to buy through a protest. In Jacoby *vs.* Kubel it is held 29 L. D., page 168, that a prior right of entry under the act of May 14, 1880, cannot be secured by proceedings on protests against an application to enter. A stipulation between the parties that a hearing ordered on a protest shall be treated as a contest will not give the protestant the *right* of a contestant if he has not *brought himself within* the *rules* regulating the initiation and prosecution of a contest. In such case he is a mere informer without interest, and as such could not have such a *claim to the land* as would

defeat Reference Board of Equitable Adjustment. Cooke *vs.* Villa, 19 L. D., page 442. It is held in Mendenhall *vs.* Gagle, 30 L. D., page 11, that "in a contest under section two of the act of May 14, 1880, the contestant must *pay* the *costs* of the contest, including the cost of testimony taken by depositions on behalf of contestee. Neither a contest nor a protest gives jurisdiction to the Land Department to enquire into an *entry* where whatever infirmity there is in the entry, if any, appears on the *face* of the entry itself. State of Utah *vs.* Allen, 27 L. D., page 53. It will be kept in mind that in the case at bar the Secretary decided the case on the record of selection alone.

The corroboration of a protest is not essential where the Land Department is bound to take judicial notice of the matters charged. The right to protest or the right to contest rests upon allegations of fact or law dehors the records. It is otherwise a useless proceeding. Every tribunal takes judicial notice of its record in a case, and if that record break down for reasons apparent on the face of the record, as our adversaries claim in this case, no jurisdiction to assail the record is acquired by a contest which has for its purpose the introduction into the record of matters that do not already appear therein. A protestant, as said above, is one who admonishes the government of some wrong *done the Government.* (104 U. S., 694.) If the protest fail, the protestant is done. (Page 696, 21 F. R., *supra;* 21 Fed. Rep., *supra,* 694.)

There is no ground in this record whereon to base a contest by a stranger to the title. The record herein is a Government record.

Where the subject-matter of the defect, if any, in the record is one that effects the *Government only*, no private person can set it up. The Government alone has the authority to vindicate its own rights. It must do so by some pleading. (Lee *v.* Johnson, 116 U. S., 52.)

Land Mineral in Character.

The most that is claimed in the protests, however, is that the land selected was "*mineral in character*" when selected. This we deny, but if true, it could not be made the ground of contest or protest for the reason that Rule 102 of the Land Department Regulations, found on page 610 of 28 L. D., declares that "no public lands shall be withheld from entry as agricultural land on account of its *mineral character*, except such as is returned by the Surveyor-General as mineral." This rule excludes the hypothesis that land suspected of being mineral; not known to be mineral is because of such suspicion withdrawn from agricultural entry. This rule makes clear the proposition that in order to take mineral land out of the law of acquisition of agricultural land, it must *be known* to be mineral at the time of its entry or selection.

In this case the Court will see by the record that the protestants in this case entered on the land for the first time about February, 1900, without the knowledge, consent or permission of the selector, who selected the land December 8th and 13th. It is seen that protestants do not claim this land by any location thereof made by themselves, but by purchase from some locator who had

not discovered oil therein, and who by sale abandoned it. Black *vs.* Elkhons. If one stake off a piece of ground without having acquired any estate therein, and attempts to sell it, he transfers no interest. Orton *vs.* Smith, 18 How., 265. He can not thereby give a preference right to buy. 1 L. D., page 76. In Matthews *vs.* Lines, 29 L. D., page 178, Secretary says "conceding that one who furnishes evidence on which a patent is set aside is equitably entitled to a preferred right of entry, there is no authority for recognizing such equity as the subject of transfer.

No land is subject to acquisition under the mineral statutes upon which there has not been a discovery of valuable mineral deposits. (Sec. 2320 of the Revised Statutes.) One who has no right to buy if his adversary were out of the way is not a contestant. (Black *vs.* Elkhorn Mining Co., 163 U. S., 445.) Third persons are shut out of the right to attack an entry where the land has been paid for. (30 L. D., 265, 145, U. S., Ala. Mercy Co. *vs.* Benson.)

It is submitted that the Court will find that these protests rest upon the affirmation of the protestant, that the lands selected were *mineral in character.* This we have shown is immaterial under the Rule 102, supra, if such were the fact, but it will appear also to this court by the prayer of the protests, filed February 12, 1900, and found on page 44 of record, that the protestant knew that the land had not disclosed mineral, for in said prayer the following language is used: "Wherefore, contestants pray that further proceedings relating to said applica-

tion (speaking of the selection) be suspended until further developments and operations shall have further demonstrated the mineral character and productive capacity of the same for mineral purposes;" and on page 51 of record in another protest, filed the same day, the prayer is: "Wherefore, contestants pray that further proceedings relating to said application (speaking of said selection) be suspended until further developments and operations shall have further demonstrated the mineral character and productive capacity of the same for mineral purposes." The theory of the protestants was for a long time during this litigation, that if it appeared from two to four months after selection that the selected lands contained mineral oil, this fact acted backwards. The Court of Appeals of California, however, held, and the Land Department held, in these very cases, that *subsequent discovery* of mineral did not vacate or affect the selection. The protests themselves, and the affidavits in support of them, though they cannot be received as a contest, and are not evidence of anything fairly construed by the Court, show that the land selected was only *suspected* of being oil land by protestants when selected.

There was no contest at any stage of the case on any matter furnished by Protestant.

The Court will see that even the Commissioner ignored the matter set up in the so-called protests, page 70 of the record. He says that the proceedings will be had upon instructions governing the manner of proceedings *upon special agents' reports.* Approved August 18, 1899. (29

L. D. 141, on page 71.) It appears that whatever proceedings the Commissioner ordered against the selection rested upon special officer's reports, thereby ignoring the method of procedure provided for in protests or contests between individuals. The special officer making the report was acting for the Government, and the proceeding on that report was a proceeding by the Government (see page 71 of record), as distinguished from a proceeding on a protest or contest affidavit. The order of the Commissioner, therefore, overruled the protests, and held that the record of selection was valid on its face, and unless successfully attacked by the Government required the issuing of a patent to the selector. This order for a hearing made by the Commissioner on a special officer's report was vacated by the Secretary on appeal, and the face of the record of selection alone considered. The distinction between methods of procedure on the s ecial officer's report and on affidavits of protest or contest was recognized by the attorney for the Government in presenting this case to the Court of first resort, found on page 133 of record, wherein he stated to the Court in the mandamus proceeding that:

"The issue in this case, if your Honor pleases, is not an issue between the selector and the protestant or the contestant in any sense. It is an issue between the selector and the United States. The protestant is not in this Court in any way, direct or indirect. He was not in the Land Department in respect to the matter which we have here considered, except as a means of informing the United States that the land which the selector attempted to take under this act was not subject to be taken under that Act. The issue is here. Whether or

not by certain proceedings in the judicial department of the Land Department a title—legal title, not the equitable title but the legal title—is vested in the selector, so that the issuance of the patent has been reduced and shrunken to a ministerial act."

It will be seen that the Commissioner proceeded on the theory that the record of selection was good on its face and unless sucessfully attacked by the Government itself on a proceeding resting on its own special officer's report, 29 L. D. 141, a patent must issue, while the secretary on appeal rested his whole defense on the alleged invalidity of the record of selection *on its face*. This was the sole proposition argued as is established by quotation from learned counsel for the Government above. The secretary withheld the patent, not because of any thing in the protest, but because in his opinion the record of selection was *void on its face*, and this is the theory of the defendant at this time. The alleged ground of the inefficiency of the record on its face set up by the Secretary is the alleged absence of a non-ocupancy affidavit accompanying the selection. Our answer to this is two-fold. *First*, that no such affidavit is required to accompany the selection by the law of June 4, 1897, under which it was made, and *second*, that the affidavit actually filed, fairly construed and accepted by the register and receiver, as a non-occupancy affidavit and also by the Commissioner, is really a non-occupancy affidavit.

Ex parte protest affidavits are not evidence of anything 3 L. D. 250, nor is it a pleading. Johnson *vs.* Leighton, (Brewer Judge); 7 Kansas 359, special agent's report no evidence; Henry C. Putnam, 5. L. D. 22.

Mandamus the Remedy.

It must be clear, therefore, that the defendant did not and could not adjudicate any controverted question of fact, and does not plead that he did; and that his action in rejecting the selections was for lack of alleged non-occupancy proof, was unwarranted and, in legal contemplation, void and of no effect. The selections, therefore, in legal contemplation, stand as they did when this unwarranted action was taken, and the primary relief that the selections be reinstated follows as consequence.

The defendant, however, was, as well ruled to answer the allegations of the petition, and show cause why he should not pass the selections to patent, and offers no reason other than the lack of non-occupancy affidavit, but by his answer admits that the lands, at the time of his selection, when the selector's title vested, was both of record and in fact vacant and open to settlement, even under his own attempted application of these terms, thus in any view rendering wholly unwarranted the preferring of charges against the selections.

The defendant admits that at the time of selection the lands were vacant lands, open to settlement.

First. This is the necessary implication from the language of his decisions.

In his decision of April 12, 1902, he says (R.):

"Nor do the papers presented by the protestants assist the selector in this matter, because so far as they make any suggestion respecting the condition of the lands in controversy at the time of their attempted selection, it is

to the effect that they were occupied for the purpose and in the course of mining exploration and work, which were being conducted with a view to the development and utilization of deposits of mineral oil believed to exist therein; and as indicating that this occupancy was in good faith and within the protection of the mining laws, it appears, by admission of the parties, that this mining exploration and work resulted in the production of petroleum oil in large and valuable quantities, giving to the land an unquestioned mineral character."

Second. It is also the necessary implication from the language of his answer.

In stating the substance of his decision of April 25, 1901, he says, that in consequence of Clarke's failure to accompany his selections with non-occupancy proof (Par. R.):

"The lands remained the property of the United States, and open to exploration for mining purposes, or to occupation and entry under the laws, and within the jurisdiction and control of the Land Department. And inasmuch as it further appeared in proof and was admitted that, while the said lands so remained the property of the United States, and so opened to exploration, or to occupation and entry, and before the said selector Clarke had, by proper averments, shown that the said lands were subject to selection, or that he was entitled to select the same as vacant lands open to settlement, the protestants had gone into possession and occupancy thereof, and had made discovery of petroleum therein, and were claiming, working, and developing the same, under certain placer mining locations, under the laws of the United States in that case made and provided; and inasmuch as before the said requirements and conditions had been complied with, it became known, and was admitted, that said lands were, in point of fact, valuable for mines and minerals, and worthless for agricultural purposes; therefore, the said supposed selections of the

said Clarke should not be and were not approved, and the same were accordingly rejected, which decision is referred to in the petition herein, and a copy of which is filed therewith, marked 'Exhibit T.'"

And referring to the supplemental affidavits filed by the selector after the defendant's first decision, he says that prior to the filing of the supplemental affidavits the protestants had entered upon the said lands, and—

"Were claiming, working and developing the deposits of mineral found therein, and because of the fact that the said lands had thereby and before the filing of the said affidavits become known as valuable for minerals and had acquired the known character of mineral lands under the laws of the United States, and as such were not open to settlement."

Third. By not noticing the allegations of the petition as to the condition of the land at the time of selection, the answer admits the truth of those allegations.

This fundamental rule of pleading was apparently ignored by the Court of Appeals, who seemed unwilling to recognize its effect in eliminating every question of fact from the case, and in view of the attitude of the court below we deem it prudent to cite the authorities.

The Code of the District of Columbia, chapter 42, governing the practice in mandamus, provides—

Sec. 1273. How applied for.—All applications for granting writs of mandamas shall be commenced by petition, verified by affidavit of the applicant, setting forth fully the ground of his application.

Sec. 1274. Rule on defendant.—Upon the filing of such petition the court may lay a rule requiring the defendant therein named to show cause within such time as the

court may deem proper why a writ of mandamus should not issue as prayed, a copy of which rule shall be served upon such defendant by a day to be therein limited.

Sec. 1275. Defendant's answer—The defendant by the day named in such order, unless for cause shown the court, shall extend the time, shall file an answer to such petition, fully setting forth all the defenses upon which he intends to rely in resisting such application, which shall be verified by his affidavit.

As will be observed the defendant is required to file sworn answer to the petition (the answer taking place of the former return to the alternative writ) and fully set forth all the defenses upon which he intends to rely in resisting the application.

As the Court of Appeals itself has said in U. S. ex rel West *vs.* Hitchcock (D. C. App):

"The act of Anne, equally with the new Code, contemplates a *return* or answer to the writ, not a demurrer to the petition; and it contemplates that in this return or answer all the facts shall be stated upon which the respondent proposes to rely. It does not contemplate that he shall keep back any of the facts by relying first on a demurrer to the petition and then falling back upon his answer, which would be proper enough in ordinary cases, but not in proceedings in *mandamus*."

"The return should be an answer or statement of facts showing the grounds upon which the respondent has acted or refused to act. It may state the facts in part or in whole by denying or admitting the allegations of the petitition, or by qualifying or explaining them; but it should in some way state all the facts necessary and proper for the determination of the cause."

Mandamus is an action at law and governed by the rules of pleading.

See the full treatment of the subject in Tapping on Mandamus, 348, et seq.

Every material allegation of the writ which is not denied in the answer or return is to be taken as admitted.

Shortt on Mandamus, p. 386.

Merrill on Mandamus, Sec. 274.

Tapping on Mandamus, 349.

13 Enc. Pl. and Pr. 734.

Any material allegations intended to be traversed should be expressly denied, and not in a doubtful or circuitous manner, or argumentatively. The return must answer, not the words, but the materiality of the writ; a return which seems to be guarded and not to deny the substance is bad.

Shortt on Mandamus, Informations and Prohibition, p. 386–7.

High on Extraordinary Legal Remedies. Sec. 472.

Tapping on Mandamus, 352–3.

Return is construed most strongly against the pleader.

Merrill on Mandamus. Sec. 274.

If return evasive or frivolous may be disregarded or stricken from files.

Merrill on Mandamus. Sec. 284.

In order to be good the return must show a sufficient reason for not obeying the mandatory clause of the alternative writ. The Court will not presume for or against its sufficiency.

Shortt on Mandamus, p. 390.

The courts have exacted from the defendant the utmost definiteness and certainty in the allegations of his return, and this not only before but also since the Statute 9 Anne, c. 20.

Shortt on Mandamus, p. 393.

A return which shows a fact only by recital is insufficient.

Shortt on Mandamus, p. 394.

A denial on information and belief being insufficient the material averments of the writ so denied will be taken as admitted.

State *vs.* Williams, 96 Mo., 13.

Merrill on Mandamus. Sec. 280.

A return which is inconsistent or repugnant will be quashed and peremptory writ issued.

High on Extra. Legal Rem. Sec. 477.

The facts being thus admitted, the case clearly falls within the prinicple of the American School of Magnetic Healing *vs.* Mc Annulty, U. S., and the action of the defendant in attempting to reject the selections for lack of accompanying non-occupancy proof is, as said in that case:

"A clear mistake of law as applied to the admitted facts, and the courts, therefore, must have power in a proper proceeding to grant relief."

And the requirements of accompanying proof of non-occupancy being unwarranted, and the lack of such proof being an insufficient excuse for rejecting the selections, mandumus should issue to compel the reinstatement and patenting of the selections.

In the analagous case where an unwarranted regulation was pleaded as a defense to mandamus, the Court of Appeals, citing Roberts *vs.* Valentine, used the following language which we submit lays down the principle contro ling here:

"But the refusal of permission to the relator to build upon his lots as proposed is the denial of the right of property. It is admitted that his proposed buildings conformed in respect of materials, safety and healthfulness to the building regulations proper, and that permission would have been issued as a matter of course had the lots been of the depth of fifty feet. *As that regulation is not within the power conferred to make building regulations, and cannot constitute a defense under the act regulating the subdivision of lots, it is the plain duty of the Commissioners to issue the permit* upon the payment of the lawful fees, which the relator is ready and willing to do. The act required of them being a purely ministerial one, can be enforced by the writ of mandamus."

MacFarland *vs.* U. S. *ex rel* Miller, 29 W. L. R. 753.

In conclusion we submit an index of the subjects—~~D. C. App.~~—covered in following brief and appendix and ask a careful consideration of the arguments under the the several heads:

Index of the Following Brief.

Statement of the case, pp. 1 to 9.

1. The effect and operation of the act of 1897. pp. 9 to 16.

The function of the Register and Receiver. (Pp. 12–14.) The supervisory power of the Land Department. (Pp. 16–18.) The remedy. (Pp. 18–19.)

II. The Defendant's Contention. (Pp. 19–27.)

The supervisory power of the defendant is purely ministerial. (Pp. 20–27.)

There was no judicial question before him for determination. (Pp. 20–21.)

Nor is there here any question of executive discretion. (Pp. 22–23.)

The scope of mandamus. (Pp. 27–31.)

It is not permissible to import into a statute a word not found there. (Pp. 31–33.)

If "unoccupied," could be held to be the equivalent of "vacant," then "unoccupied" must also be inserted in the place of "vacant," in the act of 1883. (P. 33.)

III. The Statute is Plain and Leaves no Room for Construction. (Pp. 33–48.)

The defendant himself had previously declared that the act was too plain to admit of construction (Pp. 33–34.)

The Land Department drafted the act of June 4, 1897, and stamped it as free from ambiguity. (Pp. 34–35.)

The meaning of "open to settlement." (P. 35.)

Mineral and Non-Mineral Land. (Pp. 35-39.

Petroleum not mineral. (P. 37.)

The status of the protests. (Pp. 37-38.)

The meaning of "vacant." (Pp. 39-48.)

The use of the word "vacant" by the Land Department in its Official Publications. (Pp. 40-43.)

The use of the term "vacant" in the published decisions of the Land Department. (P. 43.)

The use of the term "vacant" in previous Legislation. (Pp. 43-48.)

IV. The Defendant's Error with respect to the meaning of the Statute. (Pp. 58-64.)

He subverts the established rules of interpretation. (Pp. 48-52.)

V. Even if the term "vacant" could be held to mean "unoccupied it would be equally clear that the Defendant's action could not be sustained. (Pp. 58-72.)

What the defendant means by unoccupied. (Pp. 58-64.)

Occupancy, as the defendant intends it, is not mere presence on the land but possession by authority of law. (Pp. 63-64.)

The action of the defendant is an attempt to to resurrect the exploded doctrine that a claim to public land, can attach by occupation. (Pp. 64-65.)

"Unoccupied" is merely a magic term to conjure with, a mere shadow without substance. (P. 65.)

But under the practice of the Land Department it would not be necessary to substitute "unoccupied" for "vacant" in order to protect such a settler, for (Pp. 65-71.)

And even an express reservation of "occupied" land or land "settled upon" is not, and never has been held to be, an exception of the land from the grant or general disposition as between the Government and grantee or entryman, but a mere reservation of the right of the settler or occupant which he might abandon or forfeit. (Pp. 66-71.)

The policy of the defendant in substituting "unoccupied" for "vacant." (Pp. 71, 72.)

VI. Evidence of Non-occupancy could not be Essential to Selection Under the Act of June 4, 1897, Even if Vacant could be Held to Mean Unoccupied in its Broadest Sense. (Pp. 72-81.)

The Land Department can require evidence only when the statute or the rules of contract and evidence so require. (Pp. 73-76.)

And where the law has made no specific requirement of proof the Land Department can require proof only in cases where the burden is thrown upon the claimant by the application of the rules of evidence. (Pp. 76-81.)

VII. The Alleged Regulation Requiring a Non-occupancy Affidavit is Void. (Pp. 81-86.)

The Land Department has no authority under the act of June 4, 1897, to make any such regulation. (Pp. 81, 82.)

Nor can authority be found in any provision of the Revised Statutes or any general statute. (Pp. 82, 83.)

The alleged regulation is not appropriate. (Pp. 83-85.)

The alleged regulation is inconsistent with law. (Pp. 85-86.)

VIII. At the time the selections were made the defendant had not made or promulgated any regulation requiring the filing of proof of non-occupany. (Pp. 86-89.)

The alleged regulation was too vague and uncertain to be valid. (Pp. 86-87.)

Recital in a form neither prescribed nor promulgates the substance of the recital as a regulation. (Pp. 87-89)

IX. Even were the alleged regulation valid, the form and substance of the affidavit were left to the judgment of the local officers. (Pp. 89-90.)

X. Even were an affidavit or other proof of non-occupany essential it could not be conditioned precedent to title vesting. (Pp. 90-98.)

Even were the alleged regulation valid it amounts only to an approval of the practive of filing such an affidavit, or, at most, a direction to the local officers, and there is no intimation that failure to file the same with the form of selection will invalidate the transaction. (Pp. 93-95.)

Even regarded abstractly the defendant's contention resolves into absurdity. (Pp. 96-97.)

Even from the defendant's stand point the object of the affidavit has been accomplished. (Pp. 97-98.)

XI. The Land Department itself, in passing to patent dozens of selections not accompanied by proof of non-occupancy, and in not enforcing the alleged regulation, even had the same been valid, had established a rule of administration under which the selector made his selections and in any event can not legally apply a different rule retroactively to defeat those selections. (Pp. 98-99.)

XII. The requirement of a non-occupancy affidavit if supportable, and if not satisfied by the affidavits accompanying the selections, was waived

by the local officers in accepting the selections without demanding or requiring a further affidavit. (Pp. 100-103.)

Appendix A.

Petroleum is not Mineral. Petroleum Lands are are not Reserved from purchase or Entry Under the General Laws, and Under the Act of February 11, 1897, no Rights Attach Until Entry. Pp. 1-15.

The Origin and Nature of Petroleum. (Pp. 1-2.)

Petroleum belongs in the same category as Water. (Pp. 2.)

Lands valuable for Petroleum are not mineral lands. (Pp. 3-12.)

First. The act of 1897 is a legislative recognition that petroleum is not mineral within the meaning of the land laws. (Pp. 12-13.)

Second. No rights attach under the act of February 11, 1897, until the application to enter (Pp. 13-15.)

The rulings of the present administration of the Land Department. (Pp. 15.)

Respectfully submitted,

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In the Court of Appeals of the District of Columbia.

JANUARY TERM, 1903.

NO. 1264.

NO. 10 SPECIAL CALENDAR.

THE UNITED STATES ex rel RIVERSIDE OIL COMPANY, Appellant,

v.

ETHAN A. HITCHCOCK, Appellee.

BRIEF FOR APPELLANT.

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v.

ETHAN A. HITCHCOCK, *Appellee.*

BRIEF FOR APPELLANT.

Statement of the Case.

This is an appeal from a judgment of the court below dismissing a petition for mandamus against the Secretary of the Interior.

The answer challenged none of the allegations of fact in the petition and the case, upon the admitted facts, presented the pure question of the sufficiency in law of the reasons set up in the answer as justification for the defendant's attempted rejection of certain selections of land made by the petitioner's predecessor in title and denial of patent for same, and was heard in the court upon demurrer to the defendant's answer.

Though the record appears very voluminous the material facts may be very briefly stated.

The case arises under the legislation creating and governing national forest reserves. The policy of maintaining these reserves having been inaugurated about the year 1891, by an act authorizing their establishment by proclamation of the President, it soon became apparent that it would be essential for the government to regain possession and control of lands within the limits reserved, the title to which had or might have passed from the government or which were or might be in the possession of settlers and, as a substitute for condemnation proceedings, the act of June 4, 1897 (30 Stat., 36), contained the following provision:

> "That in cases in which a tract covered by an unperfected *bona fide* claim or by a patent is included within the limits of a public forest reservation, the settler or owner thereof may, if he desires to do so, relinquish the tract to the government, and may select in lieu thereof a tract of *vacant land open to settlement* not exceeding in area the tract covered by his claim or patent; and no charge shall be made in such cases for making the entry of record or issuing the patent to cover the tract selected: *Provided further*, that in cases of unperfected claims the requirements of the law respecting settlement, residence, improvements and so forth, are complied with on the new claims, credit being allowed for the time spent on the relinquished claims."

Under this act, one C. W. Clarke, the petitioner's predecessor in title (who will hereinafter be referred to as the selector), being the owner of certain land within the limits of a forest reserve and desiring to accept the offer of exchange contained in the act of 1897, and being

officially informed by the local officers that the land now in question was vacant land open to settlement, relinquished his said lands to the United States and selected, in lieu thereof, the lands for which patent is now sought, evidencing the same by filing in the local land office on December 14, 1899, written declarations thereof, copies of which appear in the record as Exhibits E and F, (R., 20, 22). The local land officers thereupon on behalf of the United States accepted the said relinquishments and declarations of selection and the register appended to the latter certificates that the land selected was free from conflict and that there was no adverse filing, entry, or claim thereto (R., 25, 26) made the proper entry upon their records and on January 21 and 22, 1900, forwarded the cases to the Commissioner of the General Land Office accompanied by letters certifying that the records of their office "show the lands selected to be free from conflict and subject to such selection." (Petn. Par., 11, R., 10).

After the cases had gone to the General Land Office for patenting, and pending action thereon, certain protests were filed against the selections which the petitioner moved to dismiss as being insufficient in form and substance, and ineffectual to interrupt the progress of the cases to patent.

The Commissioner of the General Land Office thereupon on December 18, 1900, rendered a decision in the matter holding that title to the selected lands could not vest until approval by him, that the lands were still open to exploration under the mining laws, and if at the date of his decision the lands could be shown to be mineral in character, it would defeat the selections, and directed the local officers to notify the selector that he would be allowed thirty days within which to apply for a hearing as to the then known character of the land,

one year after selection. This action being clearly erroneous, as was afterward held by the defendant in the similar case of the Kern Oil Co., *vs.* Clotfelter (30 L. D., 583), an appeal to the defendant was taken on behalf of the selector (R., 72) and the question presented was the propriety of the action taken by the Commissioner and his authority to take any action other than to pass the selections to patent. Whereupon the defendant, vacated the action of the Commissioner, but arbitrarily and unlawfully attempted to reject the said selections because of an alleged defect, which will be noticed later, and upon motion for rehearing and review, adhered to such action and directed the rejection and cancellation of the selections.

Thereupon the petition was filed in the court below praying that the writ of mandamus should issue to the defendant, commanding him to recall and vacate his order rejecting the said selections, reinstate the proceedings relating thereto, proceed therein as required by law, and order the same passed to patent.

We contend that the statute is plain and refers to the records of the Land Department for determination of the character of land subject to selection, that the exchanges in question were effected and the right to patent to the selected lands vested *eo instanti* upon the filing and acceptance of the relinquishments and declarations aforesaid, and that the subsequent proceedings in the Land Department were illegal and void.

Those subsequent proceedings, however, were recited in the petition and the full record set out in the exhibits therewith, so as to show the manner in which the case came before the defendant and the grounds upon which he attempted to reject the selections and refuse patent, but inasmuch as the grounds of his action are now to be

taken from his answer herein, it is only necessary to consider that answer, and the exhibits, though occupying a large portion of the record, have only a historical bearing on the case.

The defendant, in his answer, likewise recites these historical matters, and, in paragraph 10, sets up his defense in the following language, viz:

> "10. And this respondent denies that he has illegally or arbitrarily held or decided any matter or thing whatsoever in respect of the said application for selection, and he avers that by the laws of the United States the *duty is imposed upon him to construe* the acts governing the disposition of public lands of the United States and of applying the same to cases coming before him on appeal from the Commissioner of the General Land Office; that in pursuance of the duties imposed, he was required to construe and apply the terms of the Act of Congress of June 4th, 1897, wherein it was provided that the owner of land included within the limits of the public forest reservation might select in lieu thereof a tract of vacant land open to settlement, and that he accordingly did, in the exercise of his judgment and discretion in that behalf construe the said term 'vacant land open to settlement' *to exclude land in the actual occupation of any person or persons under the local customs or rules of miners* which said customs and rules are by statute incorporated into and become part of the laws of the United States; that the Commissioner of the General Land Office under the direction of the Secretary of the Interior, is authorized to enforce and carry into execution, by appropriate regulations, every part of the provisions of laws relating to public lands; that in the exercise of this authority, it became and was his duty to make regulations to carry into execution the act of June 4th, 1897, for the selection of lands in

lieu of lands included within the limits of the public forest reservation; that in pursuance of such duty he did under the direction of the Secretary of the Interior, by a form approved by the Secretary on May 9th, 1899, make and establish a regulation for the execution of said law which said regulation required that there should be submitted with the application to select an affidavit showing the lands selected to be non-mineral in character and unoccupied, and which said form of application was in force at the time when the attempted selections were made by the said Clarke; that the administration of the law relating to the selection of lands in lieu of lands included within the public forest reservation was wholly within the jurisdiction of the said Commissioner of the General Land Office under the direction of the Secretary of the Interior; that in the exercise of this discretion said Commissioner in a proper proceeding for that purpose passed upon and decided the right of the said selector Clarke to the land so selected, and that on appeal to this respondent as Secretary of the Interior, authorized and charged with the supervision of the public business relating to public lands including mines, this respondent held and decided that, by reason of the failure of the said Clarke to show in due and proper form that the said lands were at the date of said selection subject to selection as vacant lands open to settlement, the attempted selection thereof must be rejected: wherefore it became and was unlawful for this respondent, as such Secretary, or for the Commissioner of the General Land Office acting under his direction, to order any patent or patents to the said lands to issue to the said Clarke as in the said petition prayed to be commanded."

The form approved May 9, 1899, referred to, is set out in Par. 8 of the petition (R., 7) and the portion relied upon by the defendant is also set out in Par. 2 of the answer (R., 122) as follows:

> "There are also submitted certificates from the proper officers showing that the land relinquished, or surrendered, is free from encumbrance of any kind; also that all taxes thereon, to the present time, have been paid; and an affidavit showing the lands selected to be non-mineral in character and unoccupied."

This form had not been printed in any publication issued by the Land Department (See 28 L. D., 521, 523) and it is alleged in the petition (Par. 17, R. 14) and admitted by the answer that, contrary to the custom of the Land Department where affidavits are required, no form of non-occupancy affidavit had ever been adopted or furnished by the Land Department, that previous to May 4, 1898, the department had prescribed no form for selection under the act of 1897 or required any affidavit and, after the issuance of the instructions of May 4, 1898, treated the recital of the filing of a non-occupancy affidavit as merely directory and not mandatory and patented dozens of such selections in which no non-occupancy affidavit had been required or furnished.

It is also alleged in the petition (Par. 9, R. 9) and admitted by the answer that, at the time of selection, the lands in question had been by the Surveyor General returned as agricultural and were shown on the books and records of the Land Department as and being agricultural, not reserved or otherwise closed to settlement, that there was upon such records no filing, entry, or claim to the same, that there had been no discovery of mineral therein and no mineral was known to exist therein, and that the complete title to the same was in the United States and the United States were the sole and exclusive possessors and occupiers thereof as part of the vacant public land open to settlement; and (Petn., Par. 23, R. 17) that

there was no one present on the land at the time of selection and no claim to said land adverse to the selector then existed.

It also appears (Pet'n, par. 21, R., 16) that after the point of alleged lack of non-occupancy affidavit was raised by the defendant, the petitioner filed supplemental affidavits alleging specifically that the selected lands were unoccupied at the date of selection, copies of which appear in the record as Exhibits W and X (R., 103, 104), and the petition alleges, and it is admitted by the answer, that said affidavits were and are true in fact and that they were ignored by the defendant in his final action in the case.

It thus appears that at the time of selection the land was non-mineral, wholly unoccupied in fact, and admittedly subject to selection, even under the defendant's attempted construction of the act, and that the sole ground of the defendant's refusal of the patent is the alleged failure to file at the time of selection a so-called non-occupancy affidavit, which he attempts to justify upon the plea that in the exercise of his uncontrollable discretion he has construed the term vacant in the act to mean unoccupied, and, by a mere recital in an unpublished form, established a regulation making the filing of such affidavit a condition precedent to the operation of the statute.

It is also alleged in the petition (par. 22, R., 16) and admitted by the answer, that the defendant ordered oral argument of the motion for review of his first decision before the Assistant Attorney-General for his department, who, at such hearing, refused to hear any argument upon the question of the authority of the defendant to prescribe such non-occupancy affidavit and required the argument to proceed upon the assumption that the defendant had by proper and lawful regulation prescribed

such affidavit as a condition of selection under the act of 1897.

Assignment of Error.

The court below erred—

First. In overruling the petitioner's demurrer to the dafendant's answer.

Second. In holding the defendant's answer to be a sufficient defense to the petition.

Third. In not sustaining the petitioner's demurrer to the defendant's answer.

Fourth. In not granting the writ of mandamus as prayed in the petition.

Fifth. In not rendering final judgment against the defendant and commanding him to pass the selections in question to patent.

Sixth. In dismissing the petition.

Argument.

The sole ground of defense pleaded by the defendant cannot be sustained, even under his attempted construction of the act of 1897, and will be disposed of from that standpoint, but we deem it proper, first, to present our contention with respect to the act and its operation.

I.

THE EFFECT AND OPERATION OF THE ACT OF 1897.

The section of the act of 1897 here involved is a standing offer by the government to exchange vacant land open to settlement for land within the limits of forest reserves, which, when accepted by relinquishment and selection, becomes a binding contract and *eo instanti* vests the title to the selected land in the selector.

The selector is entitled to a patent in exchange for his relinquishment and, in contemplation of law, his patent issues to him immediately although, in practice, it is delayed in the routine of preparation, execution, recording and delivery.

As said by the defendant in exparte McDonald (30 Land decisions, 124):

> "By his deed of relinquishment and reconveyance to the United States of his own land situate within the boundaries of the forest reserve, and by his selection of the lieu land, McDonald accepted the standing offer or proposal of the government contained in the act of June 4, 1897, and complied with its conditions, thereby converting the mere offer or proposal of the government into a contract fully executed upon his part, and in the execution of which by the government he had a vested right. After McDonald had fully complied with the terms on which the government by said act had declared its willingness to be bound, no act of either the executive or legislative branch of the government could divest him of the right thereby acquired."

and in Clarke *v.* Northern Pacific R. R. Co. (ibid, 145, 148):

> "If the lands selected by Clarke were subject to selection at the time he made selection thereof and if, as appears to have been the case, the lands embraced in his deed of relinquishment and reconveyance were proper bases for his selections, he acquired, at the time of filing such selections and deed of relinquishment and reconveyance, vested rights in the execution by the government of its part of the contract for the exchange of lands. The lands embraced in his selections were therefore not subject to the said withdrawal, having

been previously appropriated and segregated from the other public lands in the said township by such selections."

See Lessieur *v.* Price, 12 How., 59, 74.
Rector *v.* Ashley, 6 Wall, 142, 150.

Applying the rules of law governing contracts, by which the Government is bound as well as individuals (U. S. *v.* Tingey, 5 Pet., 114), it will be seen that in the transaction contemplated by the statute are two elements—first, the contract of exchange, and, second, performance of that contract. The contract is created by tender of the relinquishment and declaration of selection by way of acceptance of the Government's standing offer. And the contract is performed by surrender of the relinquishment on the one side and the delivery of the patent on the other.

The selector's right to patent is secured by tender of the relinquishment and declaration of selection, provided title to the base land be good, the relinquishment effective and the land selected of the class prescribed in the act. But, while the selector secures his right to patent by tender of his relinquishment and selection, he cannot be required to actually surrender his relinquishment and thus part with his title unless at the same time he receives from the Government a patent, or its equivalent, for the land he selects.

In an exchange each party is vendor and vendee, and the titles to the respective parcels of land pass and vest in the respective parties at the same instant of time (Bixby *v.* Bent., 59 Cal., 522; Bishop on Contracts, sec. 79) and the selector is entitled to know by the official act of the register and receiver that the Government accepts the relinquishment of his land as payment for the land

he selects and to know that he is purchasing land and not a law-suit or precarious claim against the Government (Arndt *v.* Griggs, 134 U. S., 325), and this official act is the acceptance of the relinquishment and selection and making the entry upon the record as required by the act.

The act provides that this entry of the selection of record and the issuance of the patent shall be without cost to the selector and the government, in its proposition to exchange lands with the selector, obligates itself to see that he is put on the selected land with the same security of title under which he held his forest reserve land. Good title to one piece of land is the sole consideration for the other, and each vendor guarantees his title to the other.

The function of the Register and Receiver.

Registers and receivers are nominated by the President and confirmed by the Senate in the same manner as judges of the courts and, as evident from the solemnity of their appointment, are officers of high degree. They are the custodians of the official land records and perform all executive duties with respect to sales and entries of the public lands.

By the recent act of Jan. 28, 1898 (22 Stat.,224) Congress has confirmed their authority as previously judicially defined, by amending R. S. 2234, so as to read as follows:

> "There shall be appointed by the President, by and with the advice and consent of the Senate, a register of the land office and a receiver of public moneys for each land district established by law, *who shall have charge of and attend to the sale of public and Indian lands within their respective dis-*

> *tricts*, as provided by law and official regulations, and receivers shall be accountable under their official bonds for the proceeds of such sales, and for all fees, commissions, or other moneys received by them under any provision of law or official regulation."

This statute is significant in view of the recognized diversity in the relations of administrative officers.

> "It will be found, on a careful examination, too extensive and minute to be entered upon here that the general relation between them, of superior and inferior, is varied by the most diverse provisions, so that in respect to some bureaus the connection with the department seems almost clearical, and one of mere obedience to direction, while in others the action of the officer, although a subordinate, is entirely independent, and, so far as executive control is concerned, conclusive and irreversible."
>
> Butterworth *v.* Hoe, 112 U. S. 56.

The local officers are by statute expressly charged with the duty of furnishing official information as to the public lands.

R. S., 2239 provides that the register for any consolidated land district shall be entitled to charge additional fees for making transcripts or furnishing *any other record information respecting public lands or land titles in his district.* R. S., 2247 provides a penalty upon the register for knowingly and falsely informing an applicant that the land sought had already been entered. And by the act of March 3, 1883, (22 Stat., 484) it is provided;

> "Sec. 2. That registers and receivers shall, upon application, furnish plats or diagrams of townships in their respective districts *showing what*

> *lands are vacant and what lands are taken.* * * and said officers shall, upon application by the proper State or Territorial authorities, furnish for the purpose of taxation, a list of all lands *sold* in their respective districts."

And on the first page of the General Circular of Instructions, as issued by the Land Department for many years, is the following notice to the public :

> "Any proper information regarding *vacant public lands* may be obtained by application at any of the land offices, a list of which will be found on page ——."

And in the same circular (likewise the Coal Land Circular) it has been said : (See Gen. Cir., 1899, p. 6).

> "If the tract is *vacant* and subject to the entry applied for, the register will so certify to the receiver."

So that, both by statute and departmental notice, the public is referred to the local officers for official information as to whether land is vacant and open to settlement or entry.

The act of 1897 prescribes no form for evidencing the selector's acceptance of the Government's offer, and, applying the rules of contract and satisfying the requirements of the statute of frauds, it will be seen that the elements of the writing to be presented to the local officers with the relinquishment are merely a description of the base land, a description of the selected land, a declaration of intention to make the exchange and the signature of the selector. This also conforms to the requirements of R. S. 2355, which provides :

> "Every person making application at any of the land offices of the United States for the purchase at private sale of a tract of land shall produce to the register a memorandum in writing, describing the tract, which he shall enter by the proper number of the section, half-section, quarter-section, half quarter-section, or quarter quarter-section, as the case may be, and of the township and range, subscribing his name thereto, which memorandum the register shall file and preserve in his office."

and which may be presumed to have been in contemplation of Congress for, as is said in Commonwealth *v.* Clark (14 Gray, 372) per Bigelow, J.:

> "The distinction between a 'sale' and an 'exchange' is rather one of shadow than of substance. In both cases the title is absolutely transferred; and the same rules of law are applicable to the transaction, whether the consideration is money or a commodity" (or other land).

It will also be observed that in the act of 1897, there is no requirement of any proof on the part of the selector.

In such case proof can be demanded only when the legal rules of contract and evidence require it. This was laid down by Attorney General Butler, 3 Op., Att'y. Gen., 126 [1836], early in the administration of the public land laws.

Under the rules of contract and evidence, while the right to patent is secured by tender of the relinquishment and selection, yet, in order to enforce that right, either in the Land Department or the courts, it may be admitted that the selector can be required to show his ownership of the base land, not, however, as a condition precedent of the right to patent, but merely as a condition

of enforcing it. The selector, however, in the case at bar, admittedly complied with every requirement of the department in this respect and the title to the base land is unquestioned.

On the other hand, with respect to the selected land, as we have shown, the selector is referred to the local officers, who are required by law and official departmental instructions to inform him if the land is vacant and open to settlement; but, aside from this, under the rules of contract and evidence, an owner of land is presumed to know all about his own land and needs no information from the other party to enable him to protect himself in the trade.

And in the case at bar, as alleged in the petition and admitted by the answer, the selector, before surrendering his title, was officially informed by the local officers that the land in question was vacant land open to settlement; and the local officers accepted and filed the papers tendered by the selector, entered the selection upon the land records, appended their certificate that the land was subject to selection and forwarded the papers to the General Land Office for patenting.

Such a final certificate or receipt is the equivalent of a patent and vests the equitable title in the purchaser, entryman, or selector pending delivery of patent, subject only to

The Supervisory Power of the Land Department.

Supervisory power implies that the official act to be supervised is done by an officer upon whom the duty of doing it is conferred. It is not power to deal with the subject originally or unlimited power to set aside what has been done by the officer charged with the duty of do-

ing it. The supervisory power of the Commissioner of the General Land Office and the Secretary of the Interior over the action of the local officers (which may be admitted for the sake of the argument) is limited to vacating such action for causes which in law make the patent void or, in equity, would sustain suit to cancel it.

These principles have been established by numerous decisions of the Supreme Court.

As said in Cornelius *v.* Kessel, 128 U. S., 456, (1888):

> "The power of supervision possessed by the Commissioner of the General Land Office over the acts of the register and receiver of the local land offices in the disposition of the public lands, undoubtedly authorizes him to correct and annul entries of land allowed by them, where the lands are not subject to entry, or the parties do not possess the qualifications required, or have previously entered all that the law permits. The exercise of this power is necessary to the due administration of the Land Department. If an investigation of the validity of such entries were required in the courts of law before they could be canceled, the necessary delays attending the examination would greatly impair, if not destroy, the efficiency of the department. *But the power of supervision and correction is not an unlimited or an arbitrary power. It can be exerted only when the entry was made upon false testimony, or without authority of law. It cannot be exercised so as to deprive any person of land lawfully entered and paid for. By such entry and payment the purchaser secures a vested interest in the property and a right to a patent therefor, and can no more be deprived of it by order of the Commissioner than he can be deprived by such order of any other lawfully acquired property. Any attempted deprivation in that way of such interest will be corrected whenever the matter is presented so that the judiciary can act upon it.*"

And the italicized portion of this excerpt is repeated in Brown *v.* Hitchcock, 173 U. S., 473 (1899.)

The Remedy.

It being admitted that the land was subject to selection at the time of selection and there being no suggestion of fraud in the transaction, the exchange was effected, the selector secured a vested interest in the selected land and right to patent therefor, there was no room for exercise of supervisory power and the land passed out of the jurisdiction of the Land Department.

> "It is the general rule in respect to the sales of real estate that when a purchaser has paid the full purchase price, his equitable rights are complete and there is nothing left in the vendor but the naked legal title which he holds in trust for the purchaser, and this general rule of real estate law has been repeatedly applied by this Court to the administration of the affairs of the Land Department of the government; and the ruling has been uniform, that when in cash sales the price has been paid, or in other cases all the conditions of entry performed, the full equitable title has passed and only the naked legal title remains in the government in trust for the other party in whom is vested all the rights and obligations of ownership."
>
> Benson M. & S. Co. *v.* Alta M. & S. Co., 145 U. S., 128.

In such case mandamus will lie to compel the issuance of patent.

> "Where the right to a patent has once become vested in a purchaser of public lands, it is equivalent, so far as the Government is concerned, to a patent actually issued. *The execution and delivery*

of a patent after the right to it has become complete are mere ministerial acts of the officers charged with that duty."

Barney *v.* Dolph, 97 U. S., 652, 656.
Simmons *v.* Wagner, 101 U. S., 260, 261.
Dibble *v.* Land Co., 163 U. S., 63, 74.

II.

THE DEFENDANT'S CONTENTION.

The defendant admits that the selection was perfection all respects except the filing of a non-occupancy affidavit, which alleged omission he claims to be a fatal and incurable defect, constituting a non-compliance with law within the rule laid down in Cornelius *v.* Kessel and Brown *v.* Hitchcock, *supra*, and attempts to justify this contention by the plea that, in the exercise of what he claims to be uncontrollable discretion, he construed the term "vacant" in the act to mean "unoccupied," and, under the sanction of that substituted term, made an alleged regulation requiring, as a condition precedent of the operation of the law, an affidavit showing the land to be unoccupied, and that the selector had not complied with that requirement.

The mere statement of this contention, involving, as it does, *the requirement of proof of an admitted fact*, stamps his action as an unlawful and arbitrary attempt to destroy the selector's title, and presents a clear case for relief by mandamus, under the general doctrine that the court will by mandamus relieve against arbitrary action.

But, in order to fully present the case, we will dispose of the elements of the defendant's contention separately.

He contends that he has exercised an official discretion that is uncontrollable, but we submit that

The Supervisory Power of the Defendant is Purely Ministerial.

As we have shown, his supervisory power is limited to interposing when the patent, if issued, would be void at law or, if valid at law, voidable in equity.

His duty is the merely ministerial one of examining the record of selection and directing the issuance of patent unless one of the two conditions mentioned exist. He must either perform the ministerial act of directing patent to be prepared for signature or refuse to perform it.

There is no judicial question before him for determination.

Judicial power presupposes the existence of some cause or controversy set forth in some complaint or accusation against an opposing party appealing to judicial principles and submitted for decision in some customary form of judicial procedure, and authority in the tribunal to finally determine the matter.

The action of the defendant is admittedly not a final disposition of the matter, for if he pass a case to patent such action would not be binding on the United States or any one claiming under them ; and his action in refusing patent is likewise subject to review by the courts. All of the cases hold that the determination of questions of law by the land department is not binding on the courts As said, for instance, in N. P. R. R. Co. *vs.* Colburn, 164. U. S., 383, where the Secretary of the Interior had (under the erroneous theory pervading its entire administration of the land laws and still invoked by him in the case at bar) held that occupation and cultivation exempted land from a grant :

> "Now in this case the allegations are that Kelly never made any entry in the local land office, and the decision of the Secretary of the Interior is based simply on the fact of occupation and cultivation And while the decision of that fact may be conclusive between the parties, his ruling that such occupation and cultivation created a claim exempting the land from the operation of the land grant, is a decision on a matter of law which does not conclude the parties, and which is open to review in the courts."

And where, in a suit by the government to cancel a patent, it was contended that in issuing the patent the Secretary had acted judicially and that his action was therefore, final, the Court says:

> "It is no doubt true that the actual character of the land was as well known at the Department of the Interior as it was any where else and that the Secretary approved the lists, not because he was mistaken about the facts but because he was of opinion that coal lands were not mineral lands within the meaning of the act of 1853, and that they were open to selection by the state; but this does not alter the case. The list was certified without authority of law and, therefore, by a mistake against which relief in equity may be afforded. As was said in United States *v.* Stone, 2 Wall, 535: '*The patent is but evidence of a grant and the officer who issues it acts ministerially and not judicially.* If he issues a patent for land reserved from sale by law, such patent is void for want of authority.'"
>
> Mullan *v.* The U. S., 271.

And in Orchard *v.* Alexander, 157, U. S., 373, it is said that passing upon homestead proofs is not a judicial, but purely ministerial, act.

Nor is there here any question of executive discretion.

Executive discretion, with which the judiciary cannot interfere, also presupposes a matter of purely executive or political nature entrusted to the judgment of an executive officer whose action is final.

"Rights under our system of law and proceedure do not rest in the discretionary authority of any officer, judicial or otherwise."

per Field, J., in Ex parte Parker, 131 U. S., 221, 225.

Administrative or ministerial action is executive power in process of execution. Executive power is spontaneous official power arising out of the law itself.

The following analysis of executive and judicial functions, in Lewis on the Government of Dependencies, pages 6 to 8, is right to the point:

> "Every executive act pre-supposes a prior legislative act which is carried into execution."
>
> "A judicial proceeding is a declaration by a competent authority, after preliminary complaint and inquiry, that a person has or has not brought himself within the terms of a certain penal enactment or that he has or has not a certain legal right or obligation which another disputes with him."
>
> "An administrative proceeding is for the purpose of carrying the law into effect, where there is no question about the legal culpability or dispute about a legal right or obligation of a person. In an administrative proceeding, the Government functionary acts or may act spontaneously. In a judicial proceeding he does not act until he is set in motion by an accusation or plaint addressed to

him. Thus, the power of a visitor of a college in an English University or of a Charitable Foundation which may be exercised at his own pleasure and without any complaint being preferred to him, is to this extent administrative and not judicial. Moreover, in order to found a judicial proceeding it is necessary not only that an accusation or plaint should be addressed to the judge, but also that the party who is accused or complained of, should have an opportunity of defending himself against such accusation or plaint."

"Whereas an administrative proceeding may take place without the necessity of allowing any such opportunity of extenuation to the person whom it may effect. Hence, the term administrative may be properly confined in accordance with the ordinary usage, to executive acts not judicial. In judicature proper, there is no administration, no management, as there is in finance, public works, government lands, relief of poor, etc. Indeed, all acts voluntary, as opposed to contentions jurisdiction, are properly administrative. On the other hand, judicial decisions are sometimes made by public officers whose ordinary functions are administrative. For example, the decisions imposing fines and forfeitures, made by the Revenue Board of this country."

There is apparent confusion touching the nature of the power exercised by the Secretary of the Interior in disposing of a given piece of public land.

The Constitution vests primary jurisdiction over the sale of public land, in Congress. Congress has made the Interior Department in some cases, its agent to sell its land and in other cases has granted land directly to grantees named in the grant, over the head of the Interior Department, without consulting it in any manner whatever. Congress is under no obligation to consult

the Interior Department in respect of the sale of its lands under any circumstances. Congress has, however, provided by particular statutes for progressive methods depending upon the acts of individuals, for the disposition of its lands to private persons and, in these progressive proceedings for the acquisition of public lands has seen fit to give the Secretary of the Interior supervisory power over the legal method prescribed by such specific statutes.

But there is no general system for disposing of all lands, nor is there a judicial or discretionary element necessarily involved in the sale of any piece of public land. The nature of the transaction here does not contemplate discretion. A trade does not involve what is known in law as discretion. Congress may dispose of the public land through private agencies clothed with no official power whatever. It may give private commissions for the sale of its public lands, as it does for the sale of its bonds. There is no greater judicial quality or discretion in swapping a piece of public land under the law of June 4, 1897, than there is in swapping horses at common law.

There being nothing in the nature of the transaction which is judicial or discretionary, there is nothing in the administration of the law under which the exchange is accomplished which is either judicial or discretionary.

The law says to the owner of the forest reserve land, "Relinquish it, and select vacant land open to settlement in lieu of it." The statute of January 27, 1898, says that registers and receivers shall take charge of and attend to the sale of public land. The statute of March 3, 1883, declares that receivers and registers shall make plats or diagrams showing the vacant lands in their districts, when asked so to do. All the elements, therefore, of an exchange of land under the statute of June 4, 1897,

are statutory elements. The statute of June 4, 1897, provides for the trade and fixes the kind and quantity of and to be exchanged. The statute of January 27, 1898, names the officers who shall have charge of and attend to the sale of the public lands. The statute of March 3, 1883, declares where a list of the lands offered for exchange may be had and what shall be evidence that land is vacant. No officer of the Interior Department has discretion to change or alter or modify any of these elements or statutory conclusions.

Mere intellectual activity in transacting a given piece of business, or in swapping things, is not the exercise of judicial power, nor of discretion, in the legal sense. In the exchange involved here no form of such power could be exercised.

It is entirely *ex parte*, administrative or ministerial, from begining to end. It is one of the simplest transactions known to the law, the exchange of one piece of property for another, which exchange by law is complete in all its parts at the same instant of time, and which under the law of contracts calls for guaranty of title by each vendor to the other.

Wherever the government enters into a transaction of any kind, it is governed by the *principles of law* which apply to similar transactions between individuals and as said in Bishop on Contracts, section 422:

> "The supreme rule is that the interpreter shall inform himself of the legal doctrines connected with the subject of the particular contract and with the rules for the interpretations of contracts; then in applying the rules, that he shall suffer those adapted to influence the question to exert, each what his judgment teaches to be its proper force, and all so to co-operate together, with the precedence

> of the one over the other, which he deems to be due in the particular instance, as to work out the result which best satisfies his understanding."

The following language used in the late case of Maese *v.* Herman (183 U. S. 572, 581) is significant of the purely ministerial function of the Secretary of the Interior in issuing patents for land:

> "Nor do we think the capacity of the town to take a patent is open to dispute in the Land Office. Of that capacity Congress was satisfied, *and it is not for the Land Department to conceive and urge doubts about it raised upon disputable legal propositions.* The town and its inhabitants were certainly substantial entities in fact, and were recognized by Congress as having rights, and directed such rights to be authenticated by a patent of the United States. *It is the duty of the Land Office to issue that patent to give the town and its inhabitants the benefit of that authentication, and to remit all controveries about it to other tribunals and proceedings.* It will be observed from this view that the question in the case is narrower than appellants conceive it. It is not what rights they had before confirmation of the grant, nor what rights they may assert under or against the patent, but what Congress has done, and what it has directed the Land Department to do. It is strictly this and nothing more, and on this only we express an opinion."

The defendant's duty is mandatory to direct patent to issue if no objection to the validity of the contract exists. He has here been commanded to show cause why he does not perform that duty and has set up the defence that the patent, if issued, would be void or voidable because of non-compliance with an alleged regulation. Is he to be both executive and judiciary? Can he say, as the executive, that he refuses to perform a ministerial act for certain

reasons and then sit as the judiciary and determine that those reasons are valid and preclude an inquiry by the courts in whom all judicial power is vested by the constitution?

Can he set up an erroneous conception of the statute as a defense to the performance of a ministerial duty imposed upon him by the true intent and meaning of the statute? Can he, the servant of Congress, be thus permitted to thwart the intention of Congress?

The Scope of Mandamus.

As we shall show later, there is no room for construction of the statute involved here, and we could safely rest upon that proposition; but in the recent cases of American School of Magnetic Healing *v.* McAnnulty, in the Supreme Court, and Payne *v.* U. S. *ex rel.* Nat. R'y Pub. Co., in this court (30 W. L. R., 790), the sound doctrine that mandamus will lie wherever a right is denied through mistake of law on the part of a ministerial officer, has been confirmed.

In our system of government neither legislative nor judicial power can be conferred upon an executive officer. The function of the executive is to enforce the law as enacted by Congress, that is, *according to its true intent and meaning.* Only that true intent and meaning is law and the function of determining that true intent and meaning is vested solely in the judiciary. If an executive officer misconceive a statute, whether its meaning be clear or not, and act accordingly, he is not administering the *law*, but a creation of his own brain which is *not* the *law;* and if the true intent and meaning of the statute, which is the law, require the performance of the duty which he refuses to perform under the sanction of what he mistakenly sets up as law, mandamus should, and will, lie.

The language of the Supreme Court in the American School of Magnetic Healing case is unmistakable. They say :

> "That the conduct of the Post Office is a part of the administrative department of the Government is entirely true, but that does not necessarily and always oust the courts of jurisdiction to grant relief to a party aggrieved *by any action* by the head or one of the subordinate officials of that department *which is unauthorized by the statute* under which he assumes to act. *The acts of all its officers must be justified by some law, and in case an official violates the law to the injury of an individual the courts generally have jurisdiction to grant relief.*"

> "Here it is contended that the Postmaster General has, in a case not covered by the acts of Congress, excluded from the mails letters addressed to the complainants. His right to exclude letters, or to refuse to permit their delivery to persons addressed, *must depend upon some law of Congress, and if no such law exist, then he can not exclude or refuse to deliver them.* Conceding, *arguendo*, that when a question of fact arises, which, if found in one way, would show a violation of the statutes in question in some particular, the decision of the Postmaster General that such violation had occured, based upon evidence to that effect, would be conclusive and final, and not the subject of review by any court, yet to that assumption must be added the statement that *if the evidence* before the Postmaster General, *in any view of the facts, failed to show a violation of any Federal Law*, the determination of that official that such violation existed would not be the determination of a question of fact, *but a pure mistake of law* on his part, *because the facts being conceded, whether they amount to a violation of the statutes, would be a legal question* and not a question of fact. Being *a question of law simply*, and the case stated in the bill being

outside the statutes, the result is that the Postmaster General has ordered the retention of letters directed to complainants in a case not authorized by those statutes. To authorize the interference of the Postmaster General, the facts stated must in some aspect be sufficient to permit him under the statutes to make the order."

The facts, which are here admitted of record, show that the case is not one which by any construction of those facts is covered or provided for by the statutes under which the Postmaster General has assumed to act, and his determination that those admitted facts do authorize his action is *a clear mistake of law as applied to the admitted facts, and the courts, therefore, must have power in a proper proceeding to grant relief.* Otherwise, the invividual is left to the absolutely uncontrolled and arbitrary action of a public and administrative officer, whose action is unauthorized by any law and is in violation of the rights of the individual. Where the action of such an officer is thus unauthorized he thereby violates the property rights of the person whose letters are withheld."

"Although the Postmaster General had jurisdiction over the subject-matter (assuming the validity of the acts) and, therefore, it was his duty upon complaint being made to decide the question of law whether the case stated was within the statute yet *such a decision being a legal error does not bind the courts.*"

And this is the tenor and effect of the language of the Supreme Court and of the Court of Appeals, as well, in Roberts *vs.* Valentine. The Supreme Court says:

"Unless the writ of mandamus is to become practically valueless, and is to be refused even where a public officer is commanded to do a par-

> ticular act by virtue of a particular statute this writ should be granted. Every statute to some extent requires construction by the public officer whose duties may be defined therein. Such officer must read the law, and he must, therefore, in a certain sense, construe it, in order to form a judgment from its language what duty he is directed by the statute to perform. But that does not necessarily and in all cases make the duty of the officer anything other than a purely ministerial one. If the law direct him to perform an act in regard to which no discretion is committed to him, and which, *upon the facts existing, he is bound to perform*, then that act is ministerial, although depending upon a statute which requires in some degree a construction of its language by the officer. Unless this be so, the value of this writ is very greatly impaired. Every executive officer whose duty is plainly devolved upon him by statute might refuse to perform it, and when his refusal is brought before the court he might successfully plead that the performance of the duty involved the construction of a statute by him, and therefore it was not ministerial, and the court would on that account be powerless to give relief. Such a limitation of the powers of the court, we think, would be most unfortunate, as it would relieve from judicial supervision all executive officers in the performance of their duties, whenever they should plead that the duty required of them arose upon the construction of a statute, no matter how plain its language, nor how plainly they violated their duty in refusing to perform the act required."

And it is to be observed that the italicised sentence in the following language of the Court of Appeals:

> "The duty which is sought to be enforced by mandamus must be purely ministerial and existent at the time. The duty of the officer must be plainly defined and one that he is required by law

> to perform. In our opinion these requirements are completely satisfied by the conditions of this case. *The statute conferring the right and imposing the duty is so plain in its terms as to admit of no room for construction.*"

is not used as a limitation of the doctrine of mandamus but merely as a statement of the fact or condition presented in that case.

Under this sound doctrine of mandamus, the facts being admitted, the court must apply the the law to those facts irrespective of any tenderness towards the defendant's official position.

The defendant next contends that the term vacant in the statute means unoccupied, but **it is not permissible to import into a statute a word not found there.**

> Newhall *v.* Sanger, 92 U. S., 761, 765.
> Leavenworth, etc. R. R, Co. *v.* U. S., 92 U. S., 733, 751.
> Morrill *v.* Jones, 106 U. S., 466.
> Payne *v.* U. S. ex rel Nat. Ry. Pub. Co., 30 Wash. L. R., 791.

As said by Paterson. J., in Rex *v.* Burrell (12 Ad. & El., 468), such a mode of transportation only gives occasion to endless difficulty and this is particularly pertinent here because the term "vacant land" has a definite legal meaning involving record evidence only, while the term "unoccupied" is indefinite, as we shall show presently, and in abandoning the certainty of the record for fugitive and uncertain testimony of occupation, the defendant ignores the sound and comprehensive doctrine of the Supreme Court.

In Tarpey *vs.* Madsen, (178 U. S., 215, 221) they say:

> "A proper interpretation of the acts of Congress making railroad grants like the one in ques-

> tion requires that the relative rights of the company and an individual entryman must be determined, not by the act of the company, in itself fixing definitely the line of its road, *nor by the mere occupancy of the individual, but by record evidence*, on the one part the filing of the map in the office of the Secretary of the Interior, and on the other, the declaration, or entry, in the Local Land Office. *In this way matters resting on oral testimony are eliminated, a certainty and definiteness is given the rights of each*, the grant becomes fixed and definite; and while, as repeatedly held, the railroad company may not question the validity or propriety of the entryman's claim of record, its rights ought not to be defeated long years after its title had apparently fixed, by the fugitive and uncertain testimony of occupation."

Such being the rule with respect to gratuitous grants, it applies with greater force to a statutory exchange of lands between the government and an individual where the latter is required to relinquish his title to the United States and is guaranteed the recording of the exchange and issuing of patent without cost to him. Unless he gets title according to the record he is subject to the danger of his fugitive and uncertain testimony of occupation and has traded his secure title for an insecure one. (Arndt *v.* Griggs, *supra*).

It is of the very essence of a real estate title that it be in writing. (Bishop on Cont., 1327.)

It has long been settled by the Supreme Court that mere occupation and improvement give no vested right in the public land as against the United States and consequently not as against a purchaser from them.

Sparks *v.* Pierce, 115 U. S., 408.
Yosemite Valley Case, 15 Wall, 86.
Frisbie *v.* Whitney, 9 Wall. 187.

And, as we show later, whenever Congress has deemed it proper to protect occupants or settlers it has used apt language for the purpose. And it is to be remarked that settlers may file their claim of record before entering on the land, and if they do not, they assume the risk of other disposition by the government.

If "unoccupied" could be held to be the equivalent of "vacant," then "unoccupied" must also be inserted in place of "vacant" in the act of 1883, *supra*, and it is then the duty of the register to give official information as to what lands are unoccupied and what taken, and, as the action of the register under the act of 1883 is spontaneous and consists merely in certifying the condition of the land records, it is still plain that no oral proof is required and nothing is gained by the defendant's attempt to tamper with the statute.

But aside from these considerations—

III.

THE STATUTE IS PLAIN AND LEAVES NO ROOM FOR CONSTRUCTION.

This question and others which will be considered are really academic, because it is admitted by the pleadings that the land selected was at the time of selection "vacant land open to settlement" even under the defendant's attempted construction of those terms, but as these questions are presented in the record incidentally and are involved in other cases pending in the Land Department, we deem it prudent to notice them briefly.

The defendant himself had previously declared that the Act was too plain to admit of construction.

On April 14, 1899, in the case of Hyde (28 L. D., 284) he said:

> "*This language is so clear and explicit as to leave no room for construction.* Vacant land open to settlement is any public land to which rights may be imitated by settlement under existing laws,"

and he should certainly be bound to that proposition for—

The Land Department drafted the Act of June 4, 1897, and stamped it as free from ambiguity.

In the annual report of the Commissioner for 1896, page 71, is printed a copy of the report made by the Department on February 7, 1896, upon the then pending bill, submitting a draft of a bill as a substitute, including the section of the Act of June 4, 1897, now in question, as it was enacted. In this report, which was forwarded with approval by the Secretary, it is said:

> "Furthermore, the technicalities and other difficulties which have heretofore been experienced in construing and administering many of the public land laws have demonstrated the necessity far exercising great care to *avoid all obscure phraseology in legislation of this nature.*"

> "In view of these considerations, it appears advisable that the bill should be redrawn in such a manner as to embrace in substance all the features of the present bill, with certain additional provisions, *and that the whole should be carefully shaped throughout with reference to the results experienced so far in the practical administration of laws of this nature.*"

> "I have accordingly prepared and respectfully submit herewith for your consideration, the draft of a bill as a proposed substitute for the one submitted."

The following language of the Supreme Court is pertinent:

> "It is natural to respect the rulings of the Land Department upon any statute affecting the public domain, and if the rulings were contemporaneous with the enactment of the statute they afford a somewhat confident presumption of its meaning, *One of the reasons is that the officers of the Land Department may have recommended the statute—indeed, may have written its words*, or, at any rate, were familiar with the circumstances which induced the legislation."
>
> Midway Co. *v.* Eaton, 183 U. S., 602.

The Meaning of "Open to Settlement."

"Open to settlement manifestly means *not closed to settlement*, and the lands of the public domain are, under the general laws, all open to settlement unless or until withdrawn or reserved.

See Lockhart *v.* Johnson, 181 U. S., 521.

MINERAL AND NON-MINERAL LAND.

By general provision (R. S., 2318) and express provision in the particular laws, known mineral lands are reserved from sale or disposition except under the mining law. But in the case at bar it is admitted that, when the lands in question were selected, no mineral had been discovered or was known to exist in those lands, and we are not confronted with any question involving the application of the mining law or the reservation of known mineral lands, and counsel for the defendant frankly admit that there is no third person interested in the controversy; but inasmuch as certain papers appear in the record which seem to treat of the subject of alleged subsequently

discovered petroleum, we deem it prudent to call the court's attention to the subject, although, so far as this case is concerned, the question is purely academical.

The Government surveyors, from the beginning, have been required to observe and report the characteristics of the lands as surveys are made, and thus has arisen the general classification of agricultural (or non-mineral) and mineral lands. All surveyed public lands have been so classified upon the land records and the Government deals with them upon that classification. See Johnston *v.* Morris, 72 Fed. Rep., 897; Rule 102 Mining Regulations, 28 L. D., 610.

Land so classified as agricultural cannot be changed in legal contemplation to mineral until or otherwise than by the actual discovery of valuable mineral deposits therein. In legal contemplation it remains non-mineral notwithstanding discovery of mineral on adjacent tracts and notwithstanding the strongest probability that a mineral formation on adjoining land extends into the tract in question. And an entry of land as agricultural cannot be defeated by a subsequent discovery of mineral. These principles are so well settled that a mere reference to a few of the leading cases should suffice.

Belk *v.* Meagher, 104, U. S., 279.
Deffeback *v.* Hawke, 115 U. S., 392.
Colorado Coal and Iron Co. *v.* U. S., 123 U. S., 307.
U. S. *v.* Iron Silver M. Co. 128 U. S., 673.
Dahl *v.* Raunheim, 132 U. S., 260.
Davis *v.* Weibold, 139 U. S., 507.
Iron Silver etc. Co. *v.* Mike etc. Co., 143 U. S., 394.
Sullivan *v.* Iron S. M. Co., 143 U. S., 431.

U. S. *v.* Reed, 12 Sawy. 99, 28 Fed., 482.
Nevada Sierra Oil Co. *v.* Home Oil Co., 98 Fed., 673.
Erwin *v.* Perigo, 93 Fed., 608.
Jupiter Min. Co. *v.* Bogie G. M. Co., 11 Fed., 666.
Ledoux *v.* Forrester, 94 Fed., 600.

And no mining claim can be located or legally exist until actual discovery of valuable deposits of mineral. R. S., 2320.

O'Reilly *v.* Campbell, 116 U. S., 418.
King *v.* Amy & Silversmith Cons. M. Co., 152 U. S., 522.

PETROLEUM NOT MINERAL.

We also deem it proper to suggest that though lands valuable for deposits of petroleum are, under the act of 1896, opened to entry under the placer law in the same manner as lands chiefly valuable for building stone under the act of 1892, yet in fact and in contemplation of the land laws, petroleum is not mineral and lands in which there are even known deposits of petroleum are not for that reason mineral, and are not reserved from settlement and entry; but, this subject being also academical only, instead of pausing here, we present it more fully in appendix A, hereto. In this connection it seems proper to notice also—

THE STATUS OF THE PROTESTS.

The court will understand that a protest is a mere admonition to the government and the protestant merely *amicus curiæ*, as it were.

A protest is not the initiation of a contest, for a contest can only arise where adverse parties are applying for patent from the government.

The government is not required to take action upon a protest, but will (as was done here) ignore it if it fail (as did the protests here) to allege facts sufficient to warrant action, or if the government, through other sources, have knowledge of the facts and see that there is no ground for action, as is also the case here.

A clear definition by Mr. Justice Brewer, of the status of a protest, will be found in Wight *v.* Dubois (21 Fed., 694),

In view of the admission in the pleadings that the selected lands were at the time of selection non-mineral and unoccupied, it will be apparent, as we suggested before, that the protests have only a historical bearing on the case.

A third person cannot set up the weakness of an entry or selection of public land made by another, nor can a third person call upon that other to defend his entry or selection.

N. P. R. Co. *v.* Saunders, 166 U. S., 631.
Sioux City *v.* Griffey, 143 U. S., 32.
Tarpey *v.* Madsen, *supra.*
Lizzie Bergan, 30 L. D., 266.

The United States deals directly with its grantees and not through third persons.

Hawley *v.* Diller, 178 U. S., 486.
Lee *v.* Johnston, 116, U. S.

As we have shown, after an entry or selection is made, the issuing of a patent is a matter entirely between the government and the purchaser, and patent can be re-

fused only for the causes mentioned in Cornelius *v.* Kessel and Brown *v.* Hitchcock, *supra*.

THE MEANING OF "VACANT."

The term *vacant*, for the purposes of this statute is defined by the act of March 3, 1883, *supra*, requiring the local officers to give official information as to what lands are *vacant* and what *taken*, that is to say, vacant land is land not taken, and whether land is or is not taken, is by the statute contemplated as being within the official cognizance of the local officers.

But, even in the absence of the act of 1883, the meaning of the term would be too plain to admit of construction.

"Vacant" is a technical legal term in the civil, canon and common law, applying to the condition of title.

Originating in the civil law, and coming down in the Spanish and Mexican systems, vacant land (terranos valdios) meant the mass of public land not taken by individuals.

> "There can be no difficulty in ascertaining what was meant by the term vacant lands. In the common understanding, all the public lands are considered vacant. *The sense of that word amongst our people* is the same as it was under the Spanish Government. The word vacant when applied to lands, means those which have not been appropriated by individuals."
>
> Marshall *v.* Bompart, 18 Mo., 87.

See the elaborate treatment of the subject in the Public Domain, 1883, pp. 1125–1130.

In the canon law (and common law also) the term vavant was applied to the incumbency of a benefice.

Whether or not a church was vacant, was always a question for the ecclesiastical court.

1 Reeves' Hist., Common Law, by Finlason, 365.
Hoffman's Legal Outlines, 574.

"Vacant," as applying to benefices, appears in Magna Charta. See 1 Reeves' Hist. Com. Law, by Finlason, 270, and note by Finlason suggesting that mere *occupation* of *vacant sees* was virtually *usurpation*.

And in the common law "vacant" applied to the condition of the title of a fee—a vacant fee was one of which there was no tenant, irrespective of occupation of the land.

Hoffman's Legal Outlines, 508.

And in the several States, in dealing with their public lands, "vacant land" had the same meaning, viz: not taken by individuals; and from the beginning the term has had the same meaning in the disposition of the public lands of the United States.

The Use of the Word "Vacant" by the Land Deparment in its Official Publications.

Opening any of the General Circulars issued during years past, we find the following (references being to pages of issue of 1899):

> "Any proper information regarding *vacant* lands may be obtained by application at any of the land offices" (p. 1).

Respecting cash purchase and other entries:

> "If the tract is *vacant* and subject to the entry applied for, the register will so certify to the receiver" (p. 6).

An applicant has never been required to furnish proof of non-occupancy in order to obtain a certificate from the register that the land is vacant, and no register could legally base such a certificate upon an *ex parte* affidavit.

Again it is said:

> "Military bounty-land warrants may be located upon any *vacant* public lands of the United States that are subject to sale at private entry." P. 6.

but proof of non-occupancy in such cases has never been suggested.

And by R. S., Sec., 2347, the Commissioer is required to—

> "cause to be located, free of expense, any warrant which the holder may transmit to the General Land Office for that purpose in such State or land district as the holder or warrantee may designate, and upon good farming land, so far as the same can be ascertained from the maps, plats and the field notes of the surveyor, or from any other information in the possession of the local office."

The Commissioner selects land that is not only *vacant*, but good farming land as well, and *determines both conditions from the records.*

And (page 136), R. S., 2372, upon the subject of change of entry, is quoted, concluding:

> (The Commissioner), "is authorized to change the entry and transfer the payment from the tract erroneously entered to that intended to be entered, *if unsold;* but if *sold*, to any other tract liable to entry,"

and then paraphrased as follows:

> "A change of entry, when allowed, will be made from the tract erroneously entered to that intended to have been entered, if *vacant;* but if *not vacant*, the change may be made to any other tract liable to entry,"

thus using *vacant* as synonymous with *unsold.*

Rule 11, of Circular of Feb. 20, 1894, 18 L. D., 168, provides that:

> "The applicant should mark each of the subdivisions affected by the proposed right of way "V" or "Vacant," if it belongs to the public domain, at the time of filing of the map in the local land office, and the same must be verified by a certificate of the register."

The same language is used in other circulars and regulations found in 20 L. D., 165, 27 L. D., 664 and 27 L. D., 497. See also 1 L. D., 37, 2 L. D., 577, and 19 L. D., 76.

For years the annual reports of the Commissioner of the General Land Office have contained an approximate estimate, based upon reports from the various local land offices, of the quantity of *vacant* public lands in the several States and Territories compared with the area of *reserved* and *appropriated* lands. See Reports 1892, pp. 43–44; 1893, p. 50; 1894, p. 72; 1895, p. 66; 1896, p. 17; 1897, p. 17; 1898, pp. 17–18; 1899, p. 16; 1900, p. 20.

And in a report upon the Public Lands and their Water Supply by Professor Newell, of the Geological Survey, compiled partly from information furnished by the land department, published in 1895 and which was before Congress in 1897, lands to which no claim appeared of record were designated as vacant and, on page 510, it is

explained that vacant is a technical legal term meaning not taken of record and not referring to occupation of the land.

The use of the term vacant in the published decisions of the Land Department.

In the vernacular of the Land Department the meaning of the term "vacant" as not taken of record had been uniform previous to the defendant's action in this case. In view of the uniform official usage of the term, as shown under the preceding head, we think it hardly consistent with the limits of this brief to do more than refer to some of the cases not otherwise referred to hereinafter.

State of Florida, 19 L. D., 76.
Thompson *v.* Holroyd, 29 L. D., 362, 364.
Osborne *v.* Havens, 1 L. D., 405, 406.
Goyne *v.* Mahorney, 2 L. D., 576, 578.
Michael McVey, 1 L. D., 37.
Burrus *v.* Cantrel, 15 L. D., 397.
Neal *v.* McMullin, 16 L. D., 296, 299.
Willaimette Valley Wagon Road *v.* Morton, 10 L. D., 458.
Coffin *v.* Newcomb, 24 L. D., 360.
Farmers Canal Co., 13 L. D., 167, 169.
Swanson *v.* Galbraith, 21 L. D., 109, 111.

As said in Coffin *v.* Newcomb, *supra*:

> "An examination of the tract books in your office shows that said quarter is yet *vacant*."

The use of the term "vacant" in previous Legislation.

In addition to the act of 1883, *supra*, we call particular attention to the specific definition of the term contained in the following acts:

Act of April 27, 1817 (3 Stat., 207), where the *register and receiver were authorized to select "vacant and unappropriated lands"* in lieu of the lands reserved. They act only upon the record.

Act of March 3, 1853 (10 Stat. 256); "and to locate such warrant upon the land *so settled upon and improved by him, if the same shall then be vacant.*"

See also acts of March 3, 1877 (19 Stat., 285), and June 15, 1878 (20 Stat., 133).

The act of June 3, 1896 (29 Stat., 197):

> "Provided that this act shall not apply to commutation and homestead entries on which final certificates have been issued, and which have heretofore been cancelled, *when the lands made vacant by such cancellation have* been reentered under the homestead act."

Moreover, the act of October 1, 1890 (26 Stat., 647), provided for lieu selection of—

> "such other *vacant* surveyed Government *land* in compact form and in legal subdivisions, *subject to entry under the homestead and pre-emption laws,*"

and the Land Department understood "vacant" in its technical legal meaning, not taken of record, administered that law accordingly, recognized the register's certificate as the proper evidence of vacancy, and never thought of raising any question of occupancy or requiring any proof of non-occupancy, although that act (differing from the act of 1897) expressly conferred authority to make regulations. See Circular of Nov. 1, 1900 (11 L. D., 434) and General Circular, 1899, pages 71, 72.

But when Congress (in a similar case) deemed it proper to protect "occupants," in the act of July 1, 1898 (30

Stat., 620), it changed the phraseology and used the following terms:

> "Public land, surveyed or unsurveyed, not mineral or reserved, and not valuable for stone, iron or coal, and free from valid adverse claim or *not occupied by a settler* at the time of such entry."

And the coal land law (R. S., 2347-2352), provides for the purchase of the "vacant coal lands" of the public domain, and at the same time provides for the determination of the preference right in case of conflict between adverse claimants in possession. In its circular under this law (1 L. D., 687, 690), the department says, "the register, if the tract is vacant, will so certify to the receiver."

And below will be found references to all the Acts of Congress where the term vacant has been used, and upon examination it will be found that it has been uniformly applied to the condition of title and not to the physical condition of the land.

April 1, 1790, 1 St., 106, 107.
June 1, 1796, Sec. 4, 1 St., 490,491.
March 2, 1799, Sec. 2, 1 St., 724
May 1, 1802, Sec. 7, 2 St., 180.
March 3, 1805, Sec. 4, 2 St., 344.
April 18, 1806, Secs. 1 and 2, 2 St., 381, 382.
April 21, 1806, Sec. 2, 2 St., 395.
April 25, 1808, Sec. 2, 2 St., 502, 503.
February 15, 1811, Sec., 5, 2 St., 617, 619.
March 3, 1811, Sec. 5, 2 St., 662, 663.
April 23, 1812, Sec. 2, 2 St., 710, 711.
March 3, 1813, Sec. 5, 2 St., 812, 815.
April 27, 1816, Sec. 2, 3 St., 307.
March 1, 1817, Sec. 1, 3 St., 347.
May 11 1820, Sec. 2, 3 St., 572.
February 28, 1823, Sec. 1, 3 St., 729.
January 19, 1824, Sec. 1, 6 St., 292.

May 18, 1824, Sec. 1, 6 St., 304.
May 26, 1824, Secs. 1, 2 and 3, 4 St., 65, 66.
April 17, 1828, Sec. 1, 4 St., 263.
May 29, 1830, Sec. 2, 6 St., 437.
March 2, 1831, Sec. 2, 4 St., 451, 452.
June 15, 1832, 4 St., 534.
July 14, 1832, Sec. 1, 6 St., 524.
June 28, 1836, Sec. 1, 6 St., 646.
February 26, 1839, Sec. 1., 5 St., 355.
February 18, 1841, 5 St., 412, 413.
June 15, 1844, Secs. 1 and 4.
February 22, 1849, 9 St., 791, 792.
September 26, 1850, Secs. 7, 9 and 10, 9 St., 469, 471, 472.
January 25, 1853, Sec. 2, 10 St., 745.
March 3, 1853, Sec. 1, 10 St., 256.
March 3, 1857, Sec. 1, 11 St., 251.
June 21, 1860, Sec. 6, 12 St., 71, 72.
March 3, 1873, Sec. 1, 17 St., 607; now R. S., 2347.
March 3, 1873, 17 St., 634, 635.
March 3, 1877, Sec. 2, 19 St., 392.
March 3, 1877, Sec. 1, 19 St., 395.
June 15, 1878, Sec. 1, 20 St., 133
June 9, 1880, Sec. 1, 21 St., 171, 172.
March 3, 1883, Sec. 2, 22 St., 484.
October 1, 1890, Sec. 1, 26 St., 647.
January 12, 1891, Sec. 2, 26 St., 712.
June 3, 1896, Sec. 1, 29 St., 197.
June 4, 1897, 30 St., 36.
June 6, 1900, 31 St., 614.
March 3, 1901, 31 St., 1037.

The term has also been used in the same sense by the courts, as will appear upon examination of the following federal and state cases.

Kissell *v.* St. Louis Schools, 18 How., 19.
Martin *v.* Marks, 97 U. S., 347.
Morris *v.* U. S.
Edwards Lessee *v.* Darby, 12 Wh., 206.

Taylor *v.* Brown, 5 Cr., 242.
Taylor *v.* Meyers, 7 Wh., 26.
Jackson *v.* Clark, 1 Pet., 635.
U. S. *v.* Percheman, 7 Pet., 89.
U. S. *v.* Clarke, 8 Pet., 465.
U. S. *v.* Seton, 10 Pet., 312.
U. S. *v.* Sibbald, 10 Pet., 309.
U. S. *v.* Kingsley, 12 Pet., 479.
U. S. *v.* Clarke, 16 Pet., 232.
Lafayette's Heirs *v.* Kenton, 18 How., 199.
Slidell *v.* Grandjean, 111 U. S. 422.
Erhardt *v.* Boaro, 113 U. S., 538.
Surgett *v.* Lapice, 8 How., 48, 67.
Haydel *v.* Dufresne, 17 How., 28-30.
Savignac *v.* Garrison, 18 How., 136-7.
New Orleans *v.* U. S., 10 Pet., 711, 715, 722.
Fremont *v.* U. S., 17 How., 542, 554.
U. S. *v.* Coe, 170 U. S., 682.
Hays *v.* U. S., 175 U. S., 248, 255.
Chavez *v.* U. S., 552, 556.
Trustees *v.* Sawyer, 1 Taylor N. C., 114.
State *v.* Guano Co., 22 S. C., 50.
Thomas *v.* Daniel, 2 McCord, S. C., 358.
Burnsides *v.* Reid, 2 Wash. Va., 54, 61.
Preston *v.* Bower, 6 Munf. Va., 271.
Ringold *v.* Malott, 1 H. & J., 299, 317.
Lessees of Smith *v.* Brown, 1 Yeates, Pa., 517.
Jackson vs Ogden, 7 Johns, N. Y., 236.
Hastings *v.* Stevenson, 2 Ohio, 8.
Moyer *v.* McCullough, 1 Ind., 341.
Smith *v.* Jones, 3 Sneed, Tenn., 533, 535.
Jasper *v.* Quarles, Hardin, Ky., 469.
Marshall *v.* Bompart, 18 Mo. 84-87.
Tigh *v.* Choquette, 21, Mo., 233-236.

So that in 1897, Congress not only had before it the meaning of "vacant" in the several systems of law and the previous legislative precedents, but also the departmental official usage of the term, particularly the departmental interpretation and administration of the act of

October 1, 1890, *supra*, and even in the absence of the act of 1883, *supra*, it would be presumed that it was intended that the term was used in the same sense in the act of 1897.

> "Congress having, therefore, defined the word in one act so as to limit its application, *how can it be contended* that the definition shall be enlarged in the next act on the same subject, when there is no language used indicating an intention to produce such a result? Both acts are *in pari materia* and it will be presumed if the same word be used in both, and a special meaning were given it in the first act, that it was intended it should receive the same interpretation in the later act, in the absence of anything to show a contrary intention."
>
> Per Davis, J., in Reiche *v.* Smythe, 13 Wall., 162.

See also Chotard *v.* Pope, 12 Wheat., 587.
Wisconsin R. R. Co. *v.* Price, 133 U. S.
Sutherland Stat. & Stat. Constr., Sec. 255.

IV.

THE DEFENDANT'S ERROR WITH RESPECT TO THE MEANING OF THE STATUTE.

He subverts the established rules of interpretation.

He ignores the controlling rule stated above, and while admitting the technical meaning of vacant, seeks to escape the effect of that meaning by an attempted application of a principle which he states as follows:

> "That the words of the statute are to be read in their primary or ordinary sense and according to their usual import and common acceptation,

> unless to so construe them would be clearly repugnant to the legislative intention, or would lead to manifestly incongruous or absurd results,"

which does not apply with respect to technical legal terms, as stated a little further on in the text-writers upon which he relies.

When technichal words appear in a statute they are to be taken in a technical sense unless it appears that they were intended to be applied differently from their ordinary or legal acceptation.

> Sedgwick on Constr. of Stat. and Const. Law, 2d Ed., Pomeroy's Notes, 221.

Words in common use, when found in a statute, are to be taken in their ordinary sense, *and technical words in their technical sense*, unless as respects either a contrary intent plainly appears.

> (Ibid, p. 224.)

> See also Endlich Interp. Stat., 1st Ed., Secs. 2, 74, Dwarris on Statutes, pp. 701, 766.

The defendant reverses the presumptions of interpretation and attempts to limit the meaning of vacant to restrict the operation of the act and suggests that it is incumbent upon the elector to show that the technical legal meaning of vacant is absolutely necessary to the operation of the statute.

On the contrary, the burden is clearly upon the defendant to show that his attempted construction of "vacant" is necessary to the operation of the act and that to adopt the technical legal meaning of the term would be strange and unreasonable. He admits that to adopt the technical legal meaning of the term would not be strange and unreasonable and, in doing so, does he not remove any objection

that could be made to that meaning, under the true principles of interpretation?

Again, the Land Department, in Maher *v.* Hollinsrake 22 L. D. 375, (1896), said the act of 1890, *supra*, is clearly remedial in character and that "all such laws are to be liberally construed so as to effectually accomplish the remedy intended to be given," and, quoting from Selgwick: "so again it has been said that in case of a remedial act *everything is to be done in advancement of the remedy that can be given consistently with any construction that can be put upon it.*

And the defendant has said, in effect, in the case now before the court (R., p. 111), that the act of 1897 is a substitute for condemnation and was enacted for the benefit of the government to enable it to regain title and control of lands within forest reservations, as well as to relieve settlers from the disadvantages of being within those reservations, and in the case of Hyde (28 L. D., 284, 289), he said:

> "The provision in question is remedial in character, and should, therefore, be so construed as to advance the remedy and compass the objects sought. In Endlich on Interpretation of Statutes section 103, it is said: 'The scope of the act being ascertained, the words are to be construed as including every case clearly within that object, if they can do so by any reasonable construction, although they point primarily to another or a more limited class of cases.'"

In view of the departmental administration of the act of 1890, *supra*, and the fact that the act of 1897 was passed for the benefit of the government itself, the application of these rulings is too obvious to require discussion.

Again, the defendant says in his decision (R., 112) that there are many instances in public land legislation where, in providing a new mode of disposing of public lands, Congress has been careful to avoid contests between individuals and to prevent claims under the new law from disturbing possessory rights or imperfect claims of others and attempts to draw the conclusion that such was the purpose here.

The necessary conclusion from this premise, however, is that, if Congress had any such intention in this instance, it would have specifically provided for the reservation of such rights, as it has done in all of the instances referred to and in every instance where conditions not shown by the land records were contemplated. It has used the term "unoccupied" alone in one or two instances and "uninhabited" in one (June 3, 1878, 20 St., 30, 89), but in numerous other cases has used words descriptive of the character of possession intended, as, for instance, "so far as the same remain *vacant and unappropriated and not interfered with by an actual settlement* under any existing law" (Act March 3, 1857, 11 St., 251); "vacant and unappropriated and not interferred with by any preemption, homestead or other claim under any law" (Act March , 1877, 19 St., 285); "*vacant unoccupied* lands of the United States *not settled upon or used for municipal purposes nor devoted to any public use of such town*" (Act March 3, 1877, 19 St., 392); "vacant unappropriated lands * * provided that all actual settlers now residing in said lands shall be allowed to enter" (Act June 15, 1878, 20 St., 133); "any *vacant land* belonging to the United States *subject to preemption entry so as not to interfere with preemption rights*" (August 8, 1846, 9 St., 668).

The language of Mr. Justice Brewer, in Del Monte M. & M. Co. *v.* Last Chance M. & M. Co. (171 U. S., 55, 77), is pertinent:

> "We make these observations because we find in some of the opinions, assertions by the writers that they have devised rules which will work out equitable solutions of all difficulties. Perhaps these rules may have all the virtues which are claimed for them, and if so, it were well if Congress could be persuaded to enact them into statute; but be that as it may, the question in the courts is not, What is equity? but, "What saith the statute?"

The defendant is unable to find any authority for his attempted substitution of "unoccupied" for "vacant" and is reduced to citing language casually used by the Supreme Court in the Baca Float case (Shaw *v.* Kellogg, 170 U. S., 312) on May 2, 1898, after the passage of the act of 1897. This case did not involve the meaning of the term "vacant" but turned entirely upon the question of when title vested under the act of 1860 as affected by alleged subsequent discovery of mineral.

The defendant, however, overlooks the fact that, in 1860, Congress was legislating with respect to territory recently acquired from Mexico and using the term "vacant" in its well understood sense in the Mexican, as well as our own system. Private Spanish and Mexican grants were at that time in course of determination and confirmation and titles under valid grants were recognized by the United States, and lands covered by such claims were by the act of July 22, 1854, reserved from sale or other disposal until final action.

There was not at that time, nor until 1862, any general law authorizing or permitting settlement or occupa-

tion previous to survey, but the act of 1854, *supra*, had made a donation of land to residents of the Territory in 1853 and such persons who had removed to that Territory or should remove there and settle between January 1, 1853, and January 1, 1858, on condition of actual settlement and cultivation for not less than four years, to be forfeited, however, on the failure to designate boundaries within three months after survey. This act expressly provided that lands covered by private land claims should not be subject to these donations. By reason, however, of the Indian troubles, few, if any, settlements were made under this act, and it was unsafe to venture into the country without military escort (see *re* Garcia, 1 L. D., 279), and a land office was not established in New Mexico until 1858. As held in the Garcia case and many others, these donations were *not* grants *in præsenti*, and settlement to be valid must have been made before January 1, 1858, so that the act was practically inoperative. In 2 L. D., 522, it was held that a donation claim alleging settlement after January 1, 1858, was void on its face and did not segregate the land and exempt it from a railroad grant; and *in re* Ramirez, 1 L. D., 284, and other cases, it was held that such an invalid donation claim did not prevent the land being "*vacant and subject to entry.*"

So that in 1860, in legislating to effect a settlement of the conflicting Las Vegas claims, Congress did not deem it expedient that a single instance of settlement, where claim had *not* been filed in the local office, and which might, by reason of abandonment or failure to file within the time limited, never vest, should operate to defeat the location of one of these immense Baca Floats, and so ignored mere settlements, if any, under the act of 1854, and threw open to the Baca heirs all of the vacant lands, which term excluded only lands covered by private land

claims by virtue of the reservation in the act of 1854, and lands which had been taken on the records of the land office.

In administering the Baca Floats, the Land Department assumed the investigation of the character of the land and very properly directed a report from the Surveyor General, whose duty it would be to report any private land claims within the boundaries selected, and a report from the local officers, whose duty it would be to report the state of the record. The function of the Surveyor General is mentioned by the Court, in Shaw *v.* Kellogg, as being derived from the act of 1854.

So that the meaning of "vacant" in the Act of 1860 if any corroboration were necessary, is thus clearly seen to be the same as in all previous legislation and Land Department usage.

In 1862, however, Congress passed the general law which threw open all the unsurveyed lands to settlement, and so, when, in 1864, upon the application of the Baca heirs for permission to transfer the location of one of their floats, Congress passed the act authorizing them to locate this float upon *unoccupied* land, a reason for the change of expression is found in the presumed intention to protect settlers under the act of 1862, conditions having changed materially.

Occupied, however, is also a legal term, applying, in the strict sense, to the condition of title. As said in Bouvier, Law Dictionary:

> "Occupancy is sometimes used in the sense of occupation or holding possession; but this does not appear to be common legal use of the term."

In view of these considerations, *and as all land taken of record is necessarily legally occupied*, it is evident that the Supreme Court, in Shaw *v.* Kellogg, casually used the term "occupied" as legal or technical antonym of vacant, there being no single word which exactly expresses the negative of vacant in its legal sense.

In Belk *v.* Meagher, *supra*, the Supreme Court carefully distinguishes between *vacant in fact* and *vacant in law*.

The defendant also endeavors to draw support from casual language of the Supreme Court in Atherton *v.* Fowler (96 U. S., 513) a case which turned entirely upon the question of possession gained by violence as affecting preference right of entry, between rival settlers and endeavors to infer from the expression "it had reference to vacant land, to unimproved land," that the court used the term vacant in the sense of unoccupied in fact; but at the same time he urges that "vacant" in "vacant land open to settlement" must mean something different from "open to settlement" The same argument would necessitate a meaning for "vacant" different from "unimproved" in "to vacant land, to unimproved land," and different from "unoccupied" in "vacant unoccupied land" as used in some of the statues, *supra*, The Department has uniformly held that there can be no occupancy of public land without *improvment*, and it is needless to suggest that the court, in referring to land that could be lawfully settled upon, meant that it must be vacant of record and not already settled upon by another.

Moreover, as we will show later, the Land Department and the House Committee on Public Lands, shortly after the decision in Atherton *v.* Fowler, emphatically declared that occupancy could not operate to prevent land from being *legally vacant* and subject to entry, and the Land Department has uniformly understood the court in Ather-

ton *v.* Fowler as not intending that "vacant" meant "unoccupied."

The same considerations apply to the language of the court in Hosmer *v.* Wallace, (97 U. S., 575), and these three cases being thus disposed of, (if indeed any reference to them were required) there is left no show of authority for the defendant's attempted construction of "vacant."

As the defendant himself in *re Cobb* (31 L. D., 220) and Bakersfield Fuel and Oil Co., *v.* Saalburg (ibid, 312, 314) has repudiated the clearly erroneous suggestion of the majority opinion of the Circuit Court of Appeals in Cosmos Exploration Co. *v.* Gray Eagle Oil Co., (now pending in the Supreme Court on Appeal) that exploration might be occupancy, and has held that land is vacant and open to selection until actual discovery of mineral, notwithstanding exploration, it is hardly necessary to discuss the last mentioned case.

It seems proper, however, to call attention to the case of the Olive Land and Development Co. (103 Fed. Rep., 568), where Judge Ross delivered a sound opinion with respect to the meaning and effect of the act of 1897, and which case was never appealed. Shortly afterward in the Cosmos Exploration Co. case (104 Fed., 20), presenting the same questions, the same judge held that the court had no jurisdiction while the case was pending in the Land Department, but nevertheless proceeded to consider the merits and, in the course of his remarks, suggested that it was at least doubtful if exploration before discovery might not prevent land from being vacant. The case was thereupon appealed to the Circuit Court of Appeals which divided in opinion, the majority (two judges) holding that the court had no jurisdiction, but, like Judge Ross, going on to discuss the merits of the case

and while admitting that "no valid location of a mining claim can be made under the mining laws until a discovery of mineral," nevertheless, like Judge Ross, suggest that the mere presence on the land of miner or explorer might prevent the land from being vacant. Appeal from this decision is now pending in the Supreme Court and, for that reason alone, it could not be regarded as authority or precedent; but having decided aaginst the jurisdiction of the court it will be seen that the remainder of the opinion is pure *dicta*. The dissenting opinion of Ch. J. Gilbert, however, is a clear-cut, sound and logical treatment of the case sustaining the jurisdiction and confirming Judge Ross' views in the Olive case and these two last mentioned opinions are so convincing as to entirely remove any credence that could be given the *dicta* in the majority opinion in the Cosmos case. It is also to be observed that the contention of the defendants in the Cosmos case is stated in the majority opinion to be that, though the selected land was vacant land open to settlement at the date of selection, yet the land remains open to exploration for mineral after selection until patent issues. This doctrine was years ago overthrown in Stark *v.* Starr, 6 Wall., 406, and cases cited and has been rejected by the defendant in the case at bar, but yet Judge Ross and the majority of the Court of Appeals in the Cosmos case attempt to resurrect this exploded doctrine to defeat their jurisdiction.

It is to be borne in mind always that it is admitted in the pleadings here that there was no occupation of the land in any sense or degree, so that even the erroneous views of the majority in the Cosmos case have no application.

V.

EVEN IF THE TERM "VACANT" COULD BE HELD TO MEAN "UNOCCUPIED" IT WOULD BE EQUALLY CLEAR THAT THE DEFENDANT'S ACTION COULD NOT BE SUSTAINED.

Having shown that the language of the act is, as the defendant had previously held, too clear to admit of construction, the whole fabric of his defense falls; but, even from his changed position with respect to the meaning of the act, his action cannot be sustained.

It seems proper to inquire, first:

What the defendant means by unoccupied.

As we have said before, it is admitted in the pleadings that there was no occupation in any sense of the land in question at the time of selection and that no mineral had been discovered therein, and we pause to suggest that this portion of the discussion is also academic and is submitted wholly in the abstract, with the sole purpose of placing the subject fully before the court.

It will be observed that the defendant in his answer limits his attempted application of the term "vacant"

> "to exclude land in the actual occupation of any person or persons under the local customs or rules of miners, which said customs and rules are by statute incorporated into and become part of the laws of the United States."

He invokes no custom or rule of miners, however, but relies wholly on the statute.

In any event, such local rules and customs must be consistent with the statute and are void if they transcend

the statute or attempt to confer rights not conferred by the statute. R. S. 2319.

R. S., 2320 forbids occupation of land prior to discovery of valuable mineral deposits and it is clear that explorers for minerals cannot, in a legal sense, occupy land which they may be exploring, but have at the utmost a mere license to explore. See O'Reilly *v.* Campbell and other cases *supra*. As the defendant himself said in the case of Cobb (31 L. D., 220):

> "Until this condition precedent (filing non-occupancy affidavit) is complied with the land is subject to exploration under the mining laws, and if it is discovered or found to be mineral in character, it is no longer subject to selection, and no right can be secured by any subsequent attempt to complete or make effectual an incomplete selection under which no right vested prior to the development of the mineral quality of the land."

(See also Bakersfield Co. *v.* Saalburg, 31 L. D., 312, 314).

And the defendant has in reports to Congress, suggested that the existing laws do not, *until actual discovery*, protect prospectors exploring for oil from interference by selection under the act of June 4, 1897, and urged the passage of retroactive legislation to protect locators and prospectors; besides unlawfully attempting to withdraw millions of acres of land from entry or selection, saying that by such withdrawal, exploration and rights attaching upon discovery of mineral were not interfered with. See Reports Sec'y. Interior, 1900, p. 45-46, 1901, p. 52; Reports, Commr. G. L. O., 1901, pp. 87, 88, 1900, pp 75, 380.

The defendant in his report for 1900, (p. 46) says:

> "It was recognized, however, that the existing mining laws did not sufficiently protect mineral locators, who had based their locations upon surface indications of the existence of petroleum, owing to the fact that the character of petroleum deposit differed materially from that of other placer deposits, *and that the existence of such petroleum deposits could not, as in the case of other deposits, be established except by means of wells*, which require vast labor and expense.
>
> "Thereupon bills were introduced in Congress which proposed to allow locators of mining claims alleged to be valuable for petroleum deposits—
>
> 'Three months from and after the marking of their claims on the ground within which to begin work for the purpose of completing discovery, and such discovery when made, while working the claim with reasonable diligence, shall relate back and have effect nunc pro tunc as though made before or at the time of marking the claim on the ground.'"

These bills, he says, were returned with the recommendation that the time for making discovery be extended to twelve months.

So that attempted location and exploration before discovery of mineral do not amount to occupancy as the defendant intends that term. But, as he has in other cases attempted to apply the term "vacant" to exclude land under other conditions, we will, in order to present the whole subject, consider the full extent of his attempted distortion of the term.

He has held that "uninhabited" is not the equivalent of "unoccupied" (*Re* Cobb, *supra*). Conversely, "inhabited" cannot be the equivalent of "occupied," in his view.

And in the case of Frank Johnson (28 L. D., 537), he

held that *bona fide* improvement and cultivation, without residence, were occupation within the meaning of the term as used by Congress in the Greer County legislation.

And in Renville *v.* Givens (8 L. D., 557), *bona fide* cultivation and improvements pending completion of dwelling were held to be legal occupation within the meaning of the term as used in the Sioux Half-breed Scrip act.

And in Porter *v.* Landrum (21 L. D., 352), Graham *v.* Hendrixson and Barnet *v.* Burkhart (decisions of September 4, 1901, unreported), the defendant has made the *right* of homestead entry based upon *bona fide* legal settlement, the criterion in contests between selectors under the act of 1897 and homestead applicants and *put the burden of proof upon the settler.*

And in Leaming *v.* McKenna (31 L. D., 318), the defendant held that the selector, in his affidavit, must state the facts regarding the possession of the land by another so that the Department itself could determine its effect upon the selection.

That mere possession without color of right (which is trespass only, Ewing *v.* Barnel, 11 Pet., 41), cannot be contemplated, is shown by the act of February 25, 1885, (23 Stat., 321), prohibiting occupation of the public lands except by authority of some statute, and by the action of the Land Department and House Committee on Public Lands shortly after the decision in Atherton *v.* Fowler, when the subject of unlawful occupancy of the public domain was agitated and the passage of the act of 1885, to prevent such occupation, was being urged upon Congress.

On August 7, 1882, the House Committee, in its report on the then pending bill, said :

"In the State of California, and in others of the States and Territories, many ranchers or herders, have settled on the public lands without claim or pretense, or title or possessory rights, and have enclosed large tracts of the same with fences. Such lands, if *vacant* and *unoccupied*, would be eagerly sought for homestead and pre-emption purposes. But the fact of their occupation, so unlawful, and though, in legal contemplation, they are *vacant and subject to homestead entry and pre-emption entry*, deters the settlers from making entry thereon."

The Public Domain, 1883, page 1169.

On March 26, 1883, Secretary Teller, in a letter to the Commissioner (*re* McKittrick, 2 L. D., 638) in reply to a communication transmitting a "petition and resolution of citizens of Barbour County, Kansas, relative to the unlawful enclosing of large tracts of *vacant* Osage Indian lands in said county," said:

"I need not advise you that enclosures of the character described are unauthorized and illegal, or that settlement on such lands is limited to one hundred and sixty acres, and that such occupation does not legally exclude *bona fide* settlement by another. Such trespass on the public lands is equally offensive to law and to morals as if upon private property, *and lands not legally so appropriated are vacant and subject to disposal to whomsoever legally applies for them.*

* * * * * *

"The enclosure of McKittrick and Andrews is illegal and against the right of others who desire to settle or graze their cattle on the enclosed tracts. It gives them no exclusive right to such tracts, and they can not thereby, or by threats or by violence, prevent entry thereon by others who desire to graze on the same land or to enter thereon for any purpose within the law. This Department

> will, therefore, interpose no objections to the destruction of their fences by persons desiring to make *bona fide* settlement on such enclosed tracts."

The same considerations apply to explorers who attempt to take and hold exclusive possession of vacant land open to settlement. They have no exclusive right of exploration, but a mere license to explore in common with the public until they discover mineral or until the land is taken by an individual.

And on April 5, 1883, pursuant to Secretary Teller's direction, the Land Department issued a circular on the subject of unlawful occupation, which we quote:

> "In view of the numerous complaints of the unlawful enclosures of public lands for stock range purposes, and consequent impediment to settlement, all persons are hereby notified, as follows:
> "The public lands are open to settlement and occupation only under the public land laws of the United States, *and any unauthorized appropriation of the same is trespass.*"

And see discussion of Atherton *v.* Fowler in Powers *v.* Forbes, *supra* and Thompson *v.* Holroyd, 29 L. D., 362.

So that—

Occupancy, as the defendant intends it is not mere presence on the land but possession by authority of law—

that is, the possession of a miner after discovery or the possession of a *bona fide* qualified settler. The first is immaterial, because discovery of mineral would primarily reserve the land from entry or settlement. And with respect to the second, the Supreme Court has established the principle that settlement, without filing, does not seg-

regate the land from the vacant public domain or give any right except as between rival settlers.

> "As Mr. Justice Miller said in Frisbie *v.* Whitney, 9 Wall. 187, 19 L. ed. 668, the rights of a claimant are to be measured by the acts of Congress, and if they show 'that he acquired no vested interest in the land, then, as his rights are created by the statutes, they must be governed by their provisions, whether they be hard or lenient."

> "As Emblem never made an entry on the land, nor perfected a right to do so, it results that he had no vested right or interest which could defeat the operation of the act of 1894."

> Emblem *v.* Land Co., 184, U. S. 660,664.
> See also Tarpey *v.* Madsen, *supra.*

It has also been settled that a mineral claimant with a valid location predicated upon discovery, has only a present (not vested) right of possession, subject at any time to revocation by the Government, and no interest whatever in the title to the land unless he applies for patent.

Black *v.* Elkhorn etc. Co., *supra.*

The action of the defendant is an attempt to resurrect the exploded doctrine that a claim to public land can attach by occupation.

For a long period the Land Department administered the railroad land grants upon the theory that a claim to land could attach by mere occupation and, as between the railroad and settlers, held that the rights of the railroad became fixed at the time the company actually located its line of road on the land, and the rights of settlers at the time of settlement on the land, both conditions being the subject of oral proof, but the Supreme Court, in a

series of cases, exploded the idea of oral proof in such cases and held that, on the one hand, the definite location of the road could be evidenced only by the filing of maps in the land office and, on the other, that a claim could attach only by filing in the local land office, thus establishing the safe rule that rights must depend upon the record and not upon fugitive and uncertain testimony of unrecorded acts and intentions of individuals.

As Justice Brewer said in Tarpey *v.* Madsen, *supra.*

> "This unfortunate uncertainty and instability of title continued until the decisions of this Court in Van Wyck *v.* Knevals, 106 U. S., 360, and Kansas P. R. Co., *v.* Dunmeyer, 113 U. S., 360."

But examining the defendant's theory it is apparant that—

"Unoccupied" is merely a magic term to conjure with, a mere shadow without substance.

As we have shown, discovery of mineral therein reserves land from settlement or entry except under the mineral law and the only occupation of *non-mineral land* permitted by law in 1897, prior to filing or entry, was *bona fide* settlement by intending homesteaders, who were allowed three months within which to file in the local land office. So that such settlers are the only class of occupants who could be protected by giving vacant the effect attempted to be given it by the defendant.

But, under the practice of the Land Department it would not be necessary to substitute "unoccupied" for "vacant," in order to protect such a settler, for

The Land Department has uniformly and consistently protected a right of entry based upon bona fide legal settlement as against claimants under any of the laws, as well those that contain the word "vacant" as those that do not, in defining the class of land made subject to entry or purchase.

And even an express reservation of "occupied" land or land "settled upon" is not, and never has been held to be, an exception of the land from the grant or general disposition, as between the Government and grantee or entryman, but a mere reservation of the right of the settler or occupant which he might abandon or forfeit.

For years the department has said in its general circular that private entry or warrant location can be made only of *vacant* lands and yet has not thought of requiring proof of non-occupancy; but after the money has been paid, or the warrant surrendered, and certificate of sale issued, it has entertained a contest initiated by an applicant claiming settlement prior to purchase or location and determines the qualifications and good faith of the contestant and the legality of his settlement and awards him the land if he establish his right, making the *prior right* of the contestant the issue, and not the *mere occupation* by him. He might fail for several reasons—he might not be a citizen, he might be the owner of other lands, he might lack other qualifications, or his occupation might not amount to legal settlement.

The following quotations from Powers *v.* Forbes, 7. C. L. O., 149, are pertinent:

> "But his failure left the land subject to Forbes entry, after which he was an *occupant* only of the public lands without any valid claim, and had no

more right to the tract than if he had never claimed any, because his continued occupancy was unauthorized by any law providing for the disposal of the public lands. His right having thus become extinct, the denial of further disposition of the tract would practically withdraw it from market and sustain a possession manifestly held in violation of law. The effect of such unlawful occupancy would be to permit the occupant to escape the liabilities which attach to the acquisition of title. Taxation of the real property would not be possible because, so far as the record would show, the title still would remain in the United States. The erection of a house and the inclosure of land would not only be deemed a part of the conditions the performance of which would vest the title, but would be equivalent to title itself; and any unlawful possession and use would create a vested interest which could not be interfered with by the entry of a *bona fide* purchaser. Such result could not have been the intention of the law nor of the court," (referring to Atherton *v.* Fowler). * * *

"The continued illegal possession of the tracts by McManus, could not, therefore, defeat the entry of Forbes; but at the date of such entry the tract was under the law *vacant public land and subject thereto.*"

See also Stoddard *v.* Neigel, 15 C. L. O., 171.

And the same criterion, the right of the settler, was recognized in Show *v.* Bretzke (20 L. D., 72), in a contest between the holder of a cash certificate under the act of October 1, 1890, *supra*, and a subsequent homestead applicant alleging prior settlement. Although the act in that case used the terms *vacant land subject to pre-emption or homestead entry*, the department never thought of requiring any proof of non-occupancy or of rejecting Bretzke's entry because of the mere occupancy of Show; but Show

was required to prove his prior and superior right, and, in order to clear the record and allow his application, Bretzke's entry was canceled, not by reason of any inherent defect, but because of Show's superior right.

And in Coleman *v.* Collins, 10 C. L. O., 199, a contest between a Valentine Scrip location and alleged settlers, it appeared that the alleged settlers acquired no rights under the pre-emption laws by virtue of their alleged settlement and it was held that the land covered by the location of the scrip was at the date of such location subject thereto notwithstanding the *occupation* of the pre-emption claimants, although the act permitted Valentine scrip to be located only upon *unoccupied* and *unappropriated* public lands.

Where the statute has used the term "unoccupied," as in the Valentine scrip act, the supplemental Baca Grant act of 1864 and the Souix Half Breed scrip act of 1854, the department has always given the locators the benefit of the presumption from the record and never required any proof of non-occupancy, but has always thrown the burden of proof upon a subsequent applicant alleging *prior legal occupancy* when issue raised, as in Renville *v.* Givens, and Coleman *v.* Collins, *supra*.

And in the act of March 3, 1857, and other acts confirming grants of swamp lands, which contain the term "*vacant*," in connection with "unappropriated and *not interfered with by actual settlement*," or equivalent language, the State has always had the benefit of the presumption from the record and never been called upon to negative settlement, but the burden of establishing prior *legal settlement* has always been upon the settler, and the mere settlement of itself does not exempt the land as between the State and the Government. As the Supreme Court says, in Water and Mining Company *v.* Bugbe (96 U. S., 165):

> "As against all the world, except the pre-emption settler, the title of the United States passed to the State upon the completion of the survey; and if the settler failed to assert his claim, or to make it good, the rights of the State became absolute."

See also Gonzales *v.* French, 164 U. S., 383.
Summers *v.* Eagle, 20 L. D., 550.
Re Miner, 9 L. D., 550.

All of these suggestions focus in the proposition, of uniform application in the Land Department, that he who first accepts, either by lawful settlement on the land, or filing in the Land Office, as the case may be, the standing offer of the Government contained in any of the various laws for the disposition of the public domain, affects a contract for the purchase of the land of which all subsequent applicants or purchasers under any of the laws, whatever their language, must take notice. As said by the Supreme Court, in Shepley *v.* Cowan, 91 U. S., 330:

> "In all such cases, the first in time in the commencement of proceedings for the acquisition of the title, when the same are regularly followed up, is deemed to be the first in right."

But occupation of public land, without lawful right, has never been held, even by the Land Department, to prevent the purchase of the land under any of the laws, even though their operation be limited to unoccupied lands—always distinguishing between lawful and unlawful occupation (Slate *v.* Dorr, 2 L. D. 635), and only invoking the former in aid of the occupant asserting a right, and who only can assert or have any benefit of it. The Government cannot set it up for him or itself.

The Supreme Court, however, as we have shown, has firmly established the general principle that even lawful settlement initiates no claim and gives no rights against the Government or a purchaser from it; but, nevertheless, this uniform practice of the Department and the decisions of the Supreme Court just cited show that even when apt language is used to protect occupants, it is the *right* of the settler or occupant added to mere presence on, or possession of, the land, that constitutes occupation, and that it is such legal occupancy that the defendant contemplates by the use of the term and which has always been protected in the Land Department against applications under statutes that do not use the term "vacant" or the term "unoccupied," as well as those that do, provided the occupant come in, assume the burden and establish his prior right of entry based upon his occupation.

In the uniform practice of the Department, and under the decisions of the Supreme Court, mere presence on the land is nothing, and even lawful settlement has no standing unless and until the settler files entry or application and advances from an intention having existence only in his own mind to a formal record declaration of which others can take notice.

And if the settler fail to apply within the statutory period or lack qualifications, or fail in his proof of settlement, the land has always been regarded as having remained not only vacant and open to settlement, but unoccupied as well, for the purposes of acquiring title under any of the laws.

And it will be seen that this is a, possibly unconscious but nevertheless real, recognition of the well-known principle that *the vendor of land cannot set up a defect in, or dishonor, his own title.*

A defect in the vendor's title may be waived by the

vendee who may insist upon taking the property. The vendor cannot rescind the sale or defend a suit for specific performance by suggesting an infirmity in his own title.

Adams' Equity, 87.

We pause at this point to suggest that even had the act of 1897 contained the term unoccupied in place of the term vacant, and aside from all other considerations, the application of the act would still be too clear to admit of the consequences attempted to be deduced by the defendant for, as we have shown, the term unoccupied could not operate as an exception of the land from the operation of the act but merely as a reservation of the right of a *lawful* occupant, which he might abandon, waive, or forfeit, and it being admitted here that there was no such occupant and that this is a matter wholly between the government and the selector, there would still be presented a clear case for mandamus.

The policy of the defendant in substituting "unoccupied" for "vacant."

It is plain from what has been said that the utmost result of the defendant's substitution of "unoccupied" for "vacant," if permissible, would be to burden the selector with the risk of whatever claim a person in occupation of the land might have, which risk the long established practice of the Land Department would impose upon him without the assistance or sanction of the term "unoccupied."

As we have said, however, this is a purely academic question, because it is admitted in the pleadings that there was no occupation of the land in any sense, at the time of selection, but the argument in the abstract demonstrates that the policy of the defendant in invoking the term "unoccupied" could not have been to protect *bona*

fide settlers, who, under the practice of the department were already protected by their own right of entry, nor to protect possessors of mining claims, because lawful occupation by a miner depends primarily upon discovery and discovery itself reserves the land from settlement, and certainly not to protect trespassers, nor even explorers for mineral, because, as we have shown, the defendant himself has held that only discovery can prevent selection.

As said in U. S. ex rel West *v.* Hitchcock (30 W. L. R. 186):

> "We may infer, of course, that there is some secret reason for dissapproval not disclosed in the record, but if such secret reason there be, the courts can take no cognizance of it."

As ulterior motive cannot be imputed to the head of a department, it must be considered that in this aspect of the case, the ruling of the defendant is merely a plain error of law, and if material here, will be corrected by mandamus.

In the next place—

VI.

EVIDENCE OF NON-OCCUPANCY COULD NOT BE ESSENTIAL TO SELECTION UNDER THE ACT OF JUNE 4, 1897, EVEN IF VACANT COULD BE HELD TO MEAN UNOCCUPIED IN ITS BROADEST SENSE.

It being admitted that there was no occupancy of the land in question when selected. It is apparent that this branch of the subject is also academic, and we treat it wholly in the abstract.

The Land Department can require evidence only when the statute or the rules of contract and evidence so require.

In the administration of the laws relating to the public lands it is a necessary principle that the Land Department acts as the agent of Congress and cannot add to or change the requirements of the law. When the law makes no requirements and imposes no burden, the Land Department can prescribe none. It cannot legislate.

Questions of fact in the administration of the land laws are determined upon the principles of legal evidence and the Land Department is as much bound by the rules of evidence as a court of law.

The primary rules of evidence determine the presumptions of fact, what is *prima faci* evidence of a fact and upon whom lies the burden of proof. And, as applied to the Land Department, the records of that department, by force of the land laws and uniform decisions of the department and the courts, are evidence of the character of the land and the condition of title, and the burden of proof is upon one who sets up anything to the contrary whether he be an individual or the government.

Another rule of evidence is that he who has a *prima facia* case may rest and cannot be required to supplement that case in the absence of a showing sufficient, if true, to overcome that *prima facia* case.

These principles of evidence, as applying in the Land Department, were laid down by Att'y. Gen. Butler in 1836 (3 Op. 126).

So that land appearing upon the records as agricultural and free of any filing entry, or claim, must, from the very nature of things, be presumed to be unoccupied in

fact, legally or otherwise. The legal title draws to it the legal seisin and possession (Ewing *v.* Burnet, *supra*), and land once open to settlement and entry is presumed to continue so (Lockhart *v.* Johnson, 181 U. S., 516).

And the presumption is always that the owner is in exclusive possession and occupancy, and where the contrary is material, as in ejectment or any other form of action, it is incumbent upon the party setting it up to prove it.

In Stark *v.* Starr, 6 Wall., 402, 419, the court, in construing the meaning of the word "possession" in a statute authorizing suit to quiet possession, announced the sound doctrine, saying:

> "We do not, however, understand that the mere naked possession of the plaintiff is sufficient to authorize him to institute the suit, and require an exhibition of the estate of the adverse claimant, though the language of the statute is that 'any person in possession, by himself or his tenant, may maintain' the suit. His possession must be accompanied by a claim of right; that is, must be founded upon title, legal or equitable, and such claim or title must be exhibited by the proofs and, perhaps, in the pleadings also, before the adverse claimant can be required to produce the evidence upon which he rests his claim of an adverse estate or interest."

Similar questions have arisen in the administration of the public lands of the States and a party relying upon a right founded upon possession or occupancy has always been held to have the burden of proof, the presumption being always that public land is subject to acquirement by the first applicant.

As said in Penrose *v.* Griffiths, 4 Binney, 221:

"The origin of a party's title lies peculiarly within his own knowledge, and in the case of a naked possession, it would be nearly impossible for the opposite party to fix its commencement with any reasonable degree of certainty. Convenience, therefore, seems to require that the party making the objection should be prepared with the evidence of the facts necessary to sustain it."

"This case has been frequently affirmed in Pennsylvania, and is no longer open to question in that state; Allison *v.* Rankin, 7 Serg. & R., 269; Read *v.* Thompson, 5 Pa. St., 329; Gingrich *v.* Foltz, 19 Id., 40; B. T. C., Co. *v.* R. C. Co., 65 Id., 435.

"In Read *v.* Thompson, supra, the reasons advanced in Downing *v.* Gallagher are again repeated, and persons occupying public lands are considered as occupying the same in privity with the title of the commonwealth and its grantees and not by a paramount title, and are held bound by recitals contained in the patent issued by the commonwealth, within the rule of evidence first stated. Woodward, P. J., in charging the jury in Read *v.* Thompson, supra, which charge was approved on appeal, said: "All lands are derived from the commonwealth, and the man in possession must hold under her. He cannot hold adversely, and to protect his possession he is obliged to appeal to some of the commonwealth's statutes, either of pre-emption or limitation, or to her common law, which is his shield against every assailant."

Boatner *v.* Ventress, 20 Am. Dec., 276-7.

And entry upon lands is presumed to be subservient to the legal title. (Link *v.* Doerfer, 42 Wis., 395)

Again, the owner of land is presumed to know

who, if any one, is in actual possession of it and what right or interest such occupant has or claims, and the case falls also into the category of those where an adverse party is not required to prove facts within the particular knowledge of the other. Boetner *v.* Ventress, supra.

So that when the land records make a *prima facia* case of non-occupancy that *prima facia* case must prevail in the absence of proof to the contrary.

Kelly *v.* Jackson 8 Pet., 632.

Lillienthal *v.* Tobacco Co., 97 U. S. 268.

These principles have always been in contemplation of Congress and specific provision has been made as to the form and substance of proof whenever it was deemed necessary or proper that any fact or condition not appearing on the records of the Land Department, and *as to which the burden of proof is not thrown upon the claimant by the rules of evidence* should be shown by him.

And where the law has made no specific requirement of proof, the Land Department can require proof only in cases where the burden is thrown upon the claimant by the application of the rules of evidence.

This necessarily follows from the principle that the regulations and requirements of the Land Department must be consistent with law, and a requirement that subverts a rule of evidence, which is as much law as a rule of property, is inconsistent with law and void.

On this point, we have the decision of the Supreme Court in Shaw *v.* Kellogg, *supra*. In the administration of the Baca Floats, where the language of the act was "vacant non-mineral land" and the inquiry involved the ascertainment of the existence of any private land claims or known mines, the Land Department properly assumed

the investigation and determination of those matters and required no proof whatever from the locators, The Supreme Court approved this course and held that the character of the land was properly determinable by the Surveyor General, that is, by the Land Department, and there was no suggestion that there was any burden of proof upon the claimants or any defect in the location for failure to furnish proof.

The administration of the Valentine scrip act is a good illustration of the long established position of the department with respect to the presumptions surrounding occupancy.

The act provided that the scrip might be located on any "*unoccupied* and *unappropriated*" public land. No requirement of proof of non-occupancy was ever made, but the local officers were instructed to use the application blanks provided for military bounty-land warrants, merely changing the style and title and date of the act (See Instructions of June 17, 1874, 1 C. L. O., 69) and the burden of proving prior legal settlement and right of entry was always thrown upon a contesting settler. (Coleman *v.* Collins, *supra*).

Also the administration of the Sioux Half-Breed Scrip Act, which provided that the scrip might be located upon any of four classes :

First. Land within the reservation, upon which at date of the act the locator was an actual *bona fide* settler.

Second. Any land in the reservation which at the date of the act was not so occupied by a half-breed or any other person who had gone into the reservation under authority of law.

Third. Any other unoccupied lands subject to pre-emption or private sale.

Fourth. Any other unsurveyed lands not reserved by

the Government, upon which the locator had made improvements.

Proof was not required with respect to the second and third classes of land, but the attention of the local officers was merely called to the fact that the scrip could not be located on any lands on which there was an actual settlement, leaving it to the settler himself to come forward within the time allowed by law and establish his right.

Renville *v.* Givens, *supra.*

But with respect to the first and fourth classes of land, where the settlement of the locator himself was involved, the local officers were directed to require proof of such settlement. Circular May 28, 1878, (3 C. L. O., 126). Circular February 22, 1864, (1 C. L. O., 142).

And also the administration of the railroad land grant acts which excepted lands to which claims had *attached.* The land department, as we have shown, for a long period construed these acts as excepting lands to which a preception or homestead right had attached by mere settlement alone, but yet never called upon the railroad for proof of non-occupancy. The presumption was always that land within the place limits was within the grant and the burden was always upon an applicant to establish existing legal settlement at the date of definite location of the road, and this notwithstanding there might be pre-emption filing of record.

See Freeman *v.* Railroad Co., 2 L. D., 550, where Acting Secretary Joslyn says:

> "The burden of proof rests upon Freemen to show affirmitively that at said date a valid, subsisting adverse right had attached to the premises. *Such a state of facts cannot be presumed.*"

And in Slate *v.* Dorr, *supra*, Secretary Teller, lays down the broad general doctrine of the department with respect to presumptions and burden of proof.

> "Whilst the doctrine is sound that an entry is an appropriation of the land covered by it, it cannot be held to be an appropriation of land already appropriated. Where there is a valid prior preemption claim to the tract, the settlement is an appropriation of it and the entry subsequently allowed is subject to such claim; therefore, *the entry appropriates it against the whole world except the prior settler* and as against him it is null and void if he duly asserts his claim. The assertion of such claim necessarily initiates a contest, *and the rule is that the burden of proof is on him who contests the claim first of record.*"

The defendant suggests, as the sole reason of the requirement of proof of non-occupancy, that the land department cannot know the physical condition of any particular tract.

This proposition is so weak as to be unworthy of a moment's consideration. As we have shown, the Government is conclusively presumed to know the condition of its lands. The presumption is that public land, appearing on the records as vacant, is unoccupied, and the burden is upon any adversary to overthrow the presumption if an issue be raised; and if evidence *dehors* the record be deemed necessary in order to administer the act of 1897, it is the duty of the Government, like an individual in the same plight, to procure it.

If it be suggested that the Department has been provided with no means of investigation, that of itself would be conclusive evidence that Congress did not intend that the inquiry should go beyond the record.

The Land Department, however, has the means. It provided means in the Baca Float cases and assumed the burden of investigation through the Surveyor General; and Congress contemplates that it has the means for, by the act of July 1, 1898 (30 Stat., 620; Gen. Circular of 1899, p. 57), it provided that the Secretary should ascertain and deliver to the railroad a list of tracts which had been purchased or *settled upon or occupied by settlers.*

And the language of the Supreme Court, in Mullan v. The U. S., previously quoted, is pertinent here:

> "It is no doubt true that the actual character of the land was as well known at the Department of the Interior as it was anywhere else, and that the Secretary approved the lists, not because he was mistaken about the facts, but because he was of opinion that coal lands were not mineral lands within the meaning of the act of 1853."

And *in re* Stimson, 15 L. D., 255, the Land Department decided, when it was desired to hold the applicant to his contract, that a non-mineral affidavit was not essential to the vesting of title, for the character of the land could be shown by other means.

And, as early as 1860, it was held that the affidavit of a party claiming a pre-emption right was not the only means of ascertaining the fact (9 Op. Att'y Gen., 499).

If it could be held that evidence *dehors* the record were necessary to administer the act of 1897 it would follow that the local officers were vested with *quasi-judicial* power and required to determine the question of fact and, in doing so, they could act only upon legal evidence in some formal proceeding for that purpose, and not off-hand upon an *ex-parte* affidavit of the party in interest, which affidavit is in no sense evidence, but mere hearsay, as we show

presently. And if occupancy could be held to operate as a reservation and limitation upon the power of the land department to permit exchange under the act of 1897, as the defendant contends, such an investigation and formal proceeding would be necessary, for it would be incumbent upon the department to vindicate its authority in every instance. Then what becomes of the elements of the exchange, that the titles shall pass contemporaneously, that the selector shall have title for title and that he shall be put to no expense, and what becomes of the act of 1883, and the official instructions of the land department, *supra*, directing him to go to the local office to learn if land is "vacant?"

Instead of the simple transaction, plainly contemplated by the statute, of going to the local office with his relinquishment and selecting a tract from the register's list of vacant lands, and closing the deal without expense to him, he becomes involved in a lawsuit that may drag its weary course through the land department and into the courts and in the end he may lose not only the land he has selected but the land he has relinquished to the Government, as well, for there is no way of recovering his title except by appeal to Congress for relief.

VIII.

THE ALLEGED REGULATION REQUIRING A NON-OCCUPANCY AFFIDAVIT IS VOID.

The defendant admits that if "vacant" does not mean "unoccupied," his alleged regulation requiring a non-occupancy affidavit cannot be sustained, so that we need only consider this alleged regulation from his standpoint, but we contend, first, that

The land department has no authority under the act of June 4, 1897, to make any such regulation.

The making of regulations is *quasi* legislation and can be exercised only when expressly authorized by Congress (Harvey *v.* United States, 3 Ct., Cls., 40).

Authority to make regulations under the act of 1897 respecting the exchange of forest reserve land, is not found in the act itself. The act is silent in that respect, so far as the subject of forest lieu selection is concerned, and such silence is a negative of such authority and the strongest evidence that Congress deemed regulations unnecessary, as in fact they are, so far as the public is concerned, for, as we have shown, the existing statutes and the rules of contract plainly indicate the manner of proceeding to effect the exchange.

Nor can authority be found in any provision of the Revised Statutes or any general statute.

R. S. 441 merely charges the Secretary of the Interior with the supervision of public business relating to public lands without conferring any authority to make regulations.

R. S. 161 merely authorizes regulations not inconsistent with law for the government of the several Departments, the conduct of its officers and clerks, the distribution and performance of its business and the custody, use and preservation of the records, papers and property appertaining to it. This contemplates only regulations for the *internal* government of a Department, and not regulations affecting the public. See this distinction clearly made in Harvey *v.* United States, *supra.*

That the authority claimed is conferred by either R. S. 441, or R. S. 161, is negatived by the affirmative provision of R. S. 3478, which provides for appropriate regulations to enforce and carry into execution "every part

of the provisions of this Title not otherwise provided for."

Many of the sections of the Revised Statutes under the Title, The Public Lands, contain specific grants of authority to make regulations, copied from the previous statutes incorporated in the Revised Statutes, and R. S. 2478 is a general grant of such authority to cover cases where no special grant appears; but Sec. 2478 is limited, in terms, to the laws embodied in the Revised Statutes, and is not a general grant of authority attaching to subsequently enacted laws, as is conclusively shown by the fact that Congress, in subsequent legislation, has specifically provided for regulations wherever it deemed them necessary. An examination of the acts of Congress printed in the General Circular of 1899, pp. 162, 258, shows that in nearly every instance Congress has specifically provided for regulations, frequently several times in the same act with respect to different subjects, sometimes to be made by the Commissioner, sometimes by the Secretary and sometimes by both; and refrained from giving authority in the remaining instances.

The variation in the designation of the officer to make regulations in the instances where such authority is conferred, in itself negatives a recognition by Congress of general authority in the Secretary to make regulations; and the failure to grant authority is necessarily a legislative negative of such authority with respect to the section of the act of 1897 involved in the case at bar, and, in connection with the absence of any statutory requirement of proof, controlling evidence that Congress did not contemplate an inquiry *dehors* the record.

The alleged regulation is not appropriate.

We have demonstrated that the question of vacancy is

determined by the land records and is within the official cognizance of the local officers and that, even from the defendant's standpoint, no legal purpose is subserved by an *ex-parte* affidavit confirming the presumption arising from the record and also that, in any view, as between the Government and the selector, occupancy of the land is immaterial, and, even if material, an *ex-parte* affidavit is not evidence but mere hearsay. 1 Enc. Pl. & Pr., 335.

No officer can, upon a mere *ex-parte* affidavit, render a legal judgment or issue a certificate as to the character of land.

As said in *ex parte* Sutley, 3 L. D., 248, 250:

"*An affidavit is not evidence; it is merely a formal assurance of good faith on the part of the affiant;* while a deposition, properly taken, is as much the evidence of the deponent as though he were in the presence of the court, and there subjected to an oral cross-examination. *Thus an affidavit*, whether appearing in the verification to a pleading, or in support of an interlocutory proceeding, *is not, in fact or by intent, effective so far as the final judgment is concerned; but upon the matters appearing in a deposition the final judgment may safely rest.*"

If assurance of good faith is the only object of requiring the affidavit the regulation is void, if for no other reason, because the statute contemplates a cold and practical business transaction and the purpose of either party is not an element. Good faith is shown by paying in full for the land selected by relinquishing the land desired by the Government.

There is no legal method of ascertaining the motives of vendor or vendee and no legal issue could be raised upon such a question.

Adams, Equity, 177.
Vernon *v.* Keys, 12 East, 632.

Furthermore, there is here no suggestion of bad faith and good faith being thus admitted the object of the alleged requirement has been accomplished.

The Alleged Regulation is Inconsistent with Law.

The alleged regulation is inconsistent with the statute because it burdens the selector with a requirement not prescribed by nor within the intent of, the statute.

As said by Mr. Justice Brewer, in Whitney *v.* Taylor 158 U. S., 85):

> "At any rate Congress has not seen fit to require an affidavit to a declaratory statement and has provided for the filing of such unsworn statement as the proper means for an assertion on record of a claim under the pre-emption law, and that is all that is necessary to except the land from the scope of the grant."

Congress determines what is essential to vest rights and all that it has required the selector to do is to relinquish his land and select what he wants in place of it. The Land Department cannot burden him with any additional requirements that are not thrown upon him by the rules of contract and evidence.

While trivial in itself, even the expense of making an affidavit is expressly provided against by the act of 1897, and, in requiring an affidavit to be made and filed, the defendant is violating the statute.

In the record at page will be found a copy of an official communication from the defendant to the Chairman of the House Committee on Public Lands, of which the court will take judicial notice, calling attention to numerous cases where the Federal Courts have denied the authority of the Land Department to require affida-

vits not prescribed by statute, and asking for legislation conferring such authority upon the department.

And, as we have shown, this alleged regulation is, even under the defendant's attempted construction of the act, inconsistent with the legal rules of contract and evidence in requiring the selector to supplement a *prima facie* case and make representations to the government as to the character of its own land and contrary to the long established and consistent practice of the Land Department with respect to occupation of the public lands.

VIII.

AT THE TIME THE SELECTIONS WERE MADE THE DEFENDANT HAD NOT MADE OR PROMULGATED ANY REGULATION REQUIRING THE FILING OF PROOF OF NON-OCCUPANCY.

A regulation must not only be pursuant to express authority (Harvey *v.* United States, supra.) appropriate and consistent with law (McFadden *v.* Mining Co., 27 L. D., 350; Anchor *v.* Howe, 50 Fed. Rep., 356), but it must be *certain, and promulgated in same proper and sufficient manner so that the public have reasonable notice of it.*

The alleged regulation was too vague and uncertain to be valid.

The fact that the local officers did not understand that the approval of the form mentioned (if, indeed, it was ever called to their attention), constituted a regulation requiring an affidavit of non-occupancy, and had not required such form to be used or any proof of non-occupancy to be furnished, and had never rejected any selection for lack of such proof, is of itself controlling evidence that the alleged regulation was too vague and

uncertain to be valid; and this is emphasized by the fact that the Commissioner of the General Land Office, who prepared the Instructions and form for selection relied on by the defendant, had not, in this case or any other, regarded a non-occupancy affidavit as essential or understood that said form amounted to a mandatory regulation requiring such affidavit as a condition precedent.

Again, the term "unoccupied," standing undefined, was too vague, indefinite and uncertain to inform the public as to what state of facts a selector was required to negative upon oath and left a wide field for controversy as to what is occupation. The defendant himself demonstrated the ambiguity of the term in the case of Frank Johnson, *supra*, and only recently has he reached any definite position as to its scope (see cases supra) and, as now used by him, it is a mixed question of law and fact (see Leaming *v.* McKenna, *supra*) as to which no one can be legally required to make affidavit.

Recital in a form neither prescribes nor promulgates the substance of the recital as a regulation.

Such a method of making regulations follows the practice of Caligula rather than the rule of law and reason, viz:

> "Law is a rule of action prescribed and promulgated. It is obligatory only on those who know the fact of its existence and, therefore, must be promulgated. It imports a definite order, and must, therefore, be plainly prescribed, that it may be understood.
>
> "Human laws should not only be prescribed in clear and unambiguous language, but be efficiently promulgated or conveyed to the knowledge of

those on whom they are to operate. We have seen that Hobbes considers both so essential to the just notion of law, that he has made them a part of his definition of that term. By the former it is not meant that laws should be written out, as the word 'prescribe' would seem to import, but merely that they be conveyed in language as *free from ambiguity* as possible, be it verbal, written, or printed. *In regard to promulgation of laws, justice demands that they be made known before they become obligatory. The liberty and property of the citizen may indeed be placed in peril by the vague and unintelligible language of the laws; but much more would this be the case were laws permitted to operate without due promulgation.*"

1 Hoffman's Legal Outlines, p. 275.

And the defendant himself, since the petition in this case was filed, realizing the weakness of his position that a mere recital in a form referred to only by number and not printed in any circular or published instruction could constitute a regulation, on July 7, 1902 (31 L. D., 372), revised and reissued his Circular of Instructions under the act of 1897, and inserted therein (p. 375) the following paragraphs. (See also Par. 26, p. 375):

"All papers and proofs necessary to complete a selection must be filed at one and the same time, and until they are presented, no right will vest under the selection."

* * * * * * *

"The affidavit to support a selection based upon relinquishment of land covered by a patent or by a patent certificate must be made by the selector, or by some credible person possessed of the requsite personal knowledge in the premises, and must be filed with and *as a part of the selection.* This affi-

davit must show that the selected land is non-mineral in character; that it contains no salt springs or deposits of salt in any form sufficient to render it chiefly valuable therefore; and that it is not in any manner occupied adversely to the selector. (Form 4–061a.)"

And also printed in the circular, a form of selection (p. 377), and a form of affidavit as well (p. 380).

There being, therefor, in legal contemplation no such regulation when the selections were made, the case in this aspect clearly falls within the principle of Magnetic Healing Co. *v.* McAnnulty; Payne *v.* American Railway Publication Co., and MacFarland *v.* U. S. ex rel Miller, (29 W. L. R., 753), in which last mentioned case the court, citing Roberts *v.* Valentine, says:

> "But the refusal of permission to the relator to build upon his lots as proposed is the denial of the right of property. It is admitted that his proposed buildings conformed in respect of materials, safety and healthfulness to the building regulations proper, and that permission would have been issued as a matter of course had the lots been of the depth of fifty feet. *As that regulation is not within the power conferred to make building regulations, and cannot constitute a defense under the act regulating the subdivision of lots, it is the plain duty of the Commissioners to issue the permit* upon the payment of the lawful fees, which the relator is ready and willing to do. The act required of them being a purely ministerial one, can be enforced by the writ of mandamus."

IX.

Even were the alleged regulation valid, the form and substance of the affidavit were left to the judgment of the local officers.

And those officers, in the exercise of that discretion, accepted as sufficient the affidavits filed with the selection (R.). As those affidavits negative the facts from which legal occupancy could be inferred, the discretion of the local officers has been legally exercised. Those affidavits allege specifically that the land is non-mineral and no portion of it is worked for mineral, thus negativing any lawful occupation by miners and the lawful occupation of the same for any other purpose was legally negatived by the presumptions arising from the land records, which record evidence is of a higher character than a mere affidavit, which is hearsay.

But even had the local officers erred as to the sufficiency of the affidavit, their action, under the rule laid down in Cornelius *v.* Kessel and Brown *v.* Hitchcock, *supra*, could not, in that respect, be reviewed by the defendant, because his supervisory power is limited to questions which go to the validity of the patent and it could not reasonably be suggested to any court that a mere insufficiency in an ex parte affidavit, would invalidate a patent when full consideration had passed.

X.

Even were an affidavit or other proof of non-occupancy essential it could not be a condition precedent to title vesting.

The defendant, in effect, admits this proposition when he relies upon an alleged regulation. A regulation can not create a condition precedent. If it attempts to do so it adds to the law and is void.

The condition precedent could only be the fact itself, and not proof of that fact.

As we have shown, under the rules of contract the

right of the selector vests when he presents his relinquishment and written acceptance of the Government's standing offer, and this acceptance necessarily precedes, in the order of time, the filing of any affidavit or other papers. And, under the rules of contract, action by the local officers is not an element in the creation of the contract. If they should refuse to make the entry of record the rights of the selector would still be protected by the courts. See Duluth, etc., R'y *v.* Roy, 173 U. S., 590, where the rights of a settler who went to the local office and was told not to file his papers until a new survey should be made, was protected and given the title as against a patentee from the Government.

The filing of an affidavit is, therefore, in contemplation of law, an act subsequent in point of time to the creation of the contract, and failure to file the affidavit could not, in any view, destroy the contract.

That a regulation cannot create a condition precedent to title vesting is apparent when it is remembered that *the land department claims, and undoubtedly has, power in all cases to waive any regulation.* As said in Caledonia Mining Co., *v.* Rowen (2 L. D., 719, 720.

> "In Russell *v.* McLellan (3 W. & M., 157), where the mode of taking certain depositions departed from the rules of the court it was said: 'all our rules are open to such departures by leave of the court on good cause shown, *as all rules are established to facilitate and promote justice and not to embarrass and defeat it.*' In United States *v.* Breitling (20 How., 252) where a bill of exceptions was signed after the time limited by the rules of the court below, it is said: 'It is always in the power of the court to suspend its own rules, or to accept a particular case from their operation, whenever the purposes of justice require it.'"

And in Fierce *v.* McDougal, 11 L. D., 183, 184:

> "A rule of the department may always be waived in the interest of substantial justice, as rules are made to facilitate rather than to embarrass and defeat it."

And Bennett *v.* Cravens, 12 L. D., 647, 648:

> "In the exercise of your official discretion you waived the rule of practice in question, and considered said motion. The case was wholly within your jurisdiction, and it is not apparent that any injustice was the result of your action, or that said action was not within the limits of your discretionary power."

In the case at bar it is contended by the defendant that the rights of the selector did not attach at the time of selection because of failure to comply with an alleged regulation requiring the filing of an affidavit; yet, suppose the Department, in the exercise of its undoubted power, should waive the alleged regulation, at what time does the right attach? At the date of waiver? If so, the selector has done no further act and yet the rule is laid down by the defendant in this case that title vests *eo instanti* when the selector has done everything that he is required to do.

To say that title did not vest at the time of selection accordingly as the Department may or may not waive the regulation throws the matter in suspense, destroys law as the criterion and sets up in its place the discretion of the Department leaving the question to be decided, not upon any fixed legal principle, but according to the Department's varying idea of equity or propriety, and destroys the reciprocal relation of the parties and the finality required in all contracts.

It is often said that a valid regulation has the force of law, but this is not true, for, if it were, the Department, in waiving a regulation, would be suspending the operation of law.

As said in U. S. *v.* Eaton (144 U. S., 677); Caha *v.* U. S. (152 U. S., 211,) and re Kollock (165 U. S., 526):

> "Regulations prescribed by the President and by the heads of departments, *under authority granted by Congress*, may be regulations prescribed by law, *so as lawfully to support acts done under them and in accordance with them*, and may thus have in a proper sense the force of law."

A comparison of these three cases will show the narrow permissible scope of regulations. A regulation can bind the public only when Congress itself prescribes the requirements and expressly authorizes the executive officer to merely fill in details. Re Kollock, *supra*.

Even were the alleged regulation valid it amounts only to an approval of the practice of filing such an affidavit, or at most a direction to the local officers, and there is no intimation that failure to file the same with the form of selection will invalidate the transaction.

The defendant has realized the force of this proposition, for in his revised instructions, *supra*, he has inserted the following notice in Par. 26 (p. 376):

> "The action of the Register and Receiver in receiving a selection and making notation of the same upon their records will not in itself operate to confer any right upon the selector such as to prevent the subsequent rejection of the selection, where it is found that the selection as made was defective in any essential particular and for that reason should have been rejected."

In the administration of the land laws, proof of facts or conditions, even when required by express provision of statute, has been permitted to be filed afterward and relate back to the time of making entry.

Time can be of the essence of public land transactions only when it is made so expressly by statute or relates to matter of consideration for the entry or purchase.

The error of the defendant with respect to the alleged lack of non occupancy affidavit, resolves into his failure to observe the distinction between the contract of exchange and mere proof of a contemporaneous condition of fact upon which, according to his view of the statute, the validity of that contract depends, and his position is all the more remarkable in view of his sound ruling in Draper *v.* Wells, 25 L. D., 550 (1897), with respect to a *statutory requirement of proof*, where it is said, (p. 554)

> "The thing to be accomplished, the essence of the statutory requirement, is the development and improvement of the claim by the expenditure thereon of a stated amount in labor and improvements by the applicant or his grantors as a condition to patenting the claim. The proof thereof is required for the information and guidance of the government and not for the information or guidance of adverse parties. Differing from hte annual expenditure of one hundred dollars required by law, this five hundred dollar expenditure is not a condition to the maintenance of a mineral location. It is only a prerequisite to a patent, the obtaining of which is not necessary to the continued occupation and enjoyment of a mineral claim. The failure to make this five hundred dollar expenditure does not subject the claim to the acquisition of rights by others and much less would a failure to furnish proof of such expenditure to do so. The time of filing such proof does not affect the rights of others judicially or at all.

"Judge Cooley, in his Constitutional Limitations, (4th Ed., 93) says:

'Those directions which are not of the essence of the thing to be done, but which are given with a view merely to the proper, orderly, and prompt conduct of the business, and by a failure to obey which the rights of those interested will not be prejudiced, are not commonly to be regarded as mandatory; and if the act is performed, but not in the time or in the precise mode indicated, it may still be sufficient, if that which is done accomplishes the substantial purpose of the statute. But this rule presupposes that no negative words are employed in the statute which expressly or by necessary implication forbid the doing of the act at any other time or in any other manner than as directed.'

"In Sutherland on Statutory Construction it is said (section 447):

'Where a statute is affirmative it does not necessarily imply that the mode or time mentioned in it are exclusive, and that the act provided for, if done at a different time or in a different manner, will not have effect. Such is the literal implication, it is true; but since the letter may be modified to give effect to the intention, that implication is often prevented by another implication, namely, that the legislature intends what is reasonable, and especially that the act shall have effect; that its purpose shall not be thwarted by any trivial omission, or a departure from it in some formal, incidental and comparatively unimportant particular.'

Applying this rule of construction to the provision fixing the time of filing of proof of this expenditure, it seems to clearly result that it is directory and not mandatory."

Even regarded abstractly the defendant's contention resolves into absurdity.

He holds that title did not vest because proof of non-occupancy was lacking, and attempts to justify his alleged regulation requiring a non-occupancy affidavit on the ground that the Department could not tell whether the land was occupied or not. Then, in the abstract, he rejects the selection for one of two reasons:

First. In the absence of the affidavit he presumes the land to be *occupied*, and, therefore, not subject to selection.

Second. In the absence of the affidavit he presumes the land to be *unoccupied* and subject to selection, but denies the selector the benefit of the selection, as the penalty of failing to comply with an alleged regulation requiring an affidavit confirming that presumption.

The first reason violates the rule of evidence and the practice of the Department as to the presumption in such cases. The second reason violates the principles of right and justice. There is no middle ground, for it has to be assumed that the land is or is not occupied, one or the other; it cannot be both, and it cannot be neither.

But here he admits that the land was unoccupied in fact, so that his action, in the concrete, falls under the second proposition and he is attempting to reject the selection solely by way of punishing the selector.

The absurdity of the defendant's contention, in the concrete, is also apparent from his decision in Porter *v.* Landrum, *supra*, where Porter made selection, on April 23, 1900, regular, according to the defendant's own views, in all respects except the filing of a non-occupancy affidavit. On August 20, 1900, four month's later, Landrum filed homestead entry for the same land. The defendant

says that if Landrum has been misled by the action of the local officers in accepting his entry and has settled upon the land, he will be fully protected. Yet, at the same time, he says that the lieu selection should not have been received by the local officers, and that Porter must lose the land, though deceived by the acceptance by the local officers of his relinquishment and approval by them of his selection, and notwithstanding the United States has his land and he cannot get it back, and notwithstanding Landrum had not settled on the selected land when the selection was made, and notwithstanding the land was then unoccupied in every sense.

And in *re* Cobb, *supra*, he held that it was the duty of the local officers to reject an imperfect selection upon presentation, and that "it was not incumbent upon them to invite the selector to present the requisite proofs and to await his action in that matter." Yet the Department had always previously held that an applicant shall not suffer through the error or inadvertence of the local officers (Carter *v.* Blunt, 17 L. D., 96, 99). And in 2 L. D., 260, the duty of the local officers to point out defects and allow immediate amendment was emphasized. See also Duluth, etc., R'y Co. *v.* Roy, 173 U. S., 590.

Even from the defendants stand point the object, of the affidavit has been accomplished.

In the instructions of February 19, 1902, (31 L. D., 251) the defendant held that the requirement in his previous instructions under the act of 1897 that the non-mineral affidavit should state whether the land is within six miles of any mining claim, was not a condition necessary to the completion of the selection and that where publication had been had the reason for the requirement no longer existed.

Reason being the criterion, the purpose of a non-occupancy affidavit has likewise been subserved, for the defendant admits that there was no occupation of the land and that there is no adverse interest

Again if it be suggested that the purpose of requiring the non-occupancy affidavit was to protect mineral locators or settlers, that purpose was subserved, in the abstract, by publication of notice of the selection, imposed upon the selector in the face of the statutory direction that he be put to no expense, and by delaying the issuing of patent for three months to give any settler opportunity to tender application to enter the land within the statutory period of three months after settlement. See Circular (L. D.) par.

Again the selector could not be presumed to know which portion of the so-called regulation was intended to be directory and which mandatory, and it would certainly seem that if any portion were intended to be mandatory it would be that printed in the regulation itself, and not a mere recital in a form never printed in any published Instruction.

Again, the certificate of the local officers supplied every purpose of an affidavit. See Bohun *v.* Brest, (24 L. D., 16).

XI.

The Land Department itself, in not enforcing the alleged regulation, even had the same been valid, had established a rule of administration under which the selector made his selections and in any event cannot legally apply a different rule retroactively to defeat those selections.

It is admitted in the pleadings that this alleged regulation had never been enforced before the defendant attempted to apply it to defeat the selections in the case at bar, and that dozens of cases had been passed to patent without any accompanying non-occupancy affidavit. The selections here were made in the manner approved by such then existing practice and no suggestion of the necessity of any further affidavit was made by the local officers or the Commissioner of the General Land Office.

Under the familiar rules, applying to changes in the interpretation of statutes and the established rules of the Land Department, such a change in the practice of Land Department could operate only prospectively.

Savings Bank *v.* County of Franklin, 128 U. S., 526, and cases cited.
Minor *v.* Marriott, 2 L. D., 711.
Gowdy *v.* Kismet Gold M. Co., 24 L. D., 191.

See also, 8 L. D., 109; 6 L. D., 217; 7 L. D., 75; 8 L. D., 399; 6 L. D., 145; 6 L. D., 225; 5 L. D., 167; 5 L. D., 261; 5 L. D., 380; 9 L. D., 86; 9 L. D., 189; 9 L. D., 284; 9 L. D., 359; 10 L. D., 654; 22 L. D., 675.

If the defendant's action here could be sustained, all of the patents so previously issued are void and it would be his duty to cause suits to cancel them to be instituted; but it is needless to suggest that no court would seriously consider such a proposition.

XI.

The requirement of a non-occupancy affidavit, if supportable,

The requirement of a non-occupancy affidavit, if supportable, and if not satisfied by the affidavits accompanying the selections was waived by the local officers in accepting the selections without demanding or requiring a further affidavit.

Bearing in mind that the Government stands in no better plight than an individual with respect to contractual relations, and applying the legal rules of contract, it will be seen that after the consideration has passed the vendor is estopped from setting up any such objection to giving the deed of conveyance as the defendant relies upon. He would not be permitted to plead oversight on his part or the part of his agent. The land being admittedly *vacant land open to settlement*, any court would say: "You have exchanged exactly what you offered to exchange and if you had any right to demand proof you should have demanded it before you closed the deal and took the consideration. You have the other man's land and it shocks the moral sense to suggest that you want to back out. Even if you could show that the land was not 'vacant land open to settlement,' within the terms of your contract, and could make that defense, of what consequence would a false affidavit be? And if the land was 'vacant land open to settlement,' what possible injury can you have suffered by closing the deal without calling for proof of that fact?"

So that every view leads ultimately to the fundamental truth that even under the defendant's attempted construction of the act it is the *fact* and not the *proof* that is the essence of the transaction.

The local officers in the exercise of their primary powers, accepted the selections and affidavits tendered therewith, and certified the case for patent. In failing to require a further affidavit the alleged regulation was vio-

lated by them, if at all, and not by the selector.

This very question was before the Supreme Court of Mississippi in Carter *v.* Spencer, 4 How., (Miss.), where that court said:

> "Under this act (April 15, 1832), the Secretary prescribed rules and regulations by which the individuals claiming under it should be governed. The claimant was required to make proof by his own affidavit, supported by the affidavit of a disinterested person, that he was an actual housekeeper on the land. Another rule was that the right conferred by the act was not to interfere with public sales or private entries. And in order to prevent confusion, an applicant for private entry was required to swear that the land designed to be entered was not subject to the right of preemption. In the violation of this last provision, it is said that the fraud was perpetrated * * * It is alleged in the bill that Spencer entered without making this affidavit. This is admitted by the answer, which avers also that no such affidavit was required of him by the register, in addition to which the entry without it is evidence that it was dispensed with by the register * * * It was a mere instruction which required the affidavit. The law did not require it. * * * But if the instruction was violated, it was done by the register, not by Spencer."

And it is worthy of note that the regulation mentioned in that case, being violative of the rule of evidence that corroborative testimony cannot be required to supplement a *prima facia* case, as announced by Attorney General Butler, (3 Op., 126), was afterwards revoked and no such affidavit has been required of a cash applicant for many years.

And in dealing with a similar question, differing in

the fundamental feature however, that the requirement was one of *statutory provision*, the Supreme Court, in United States *v.* Morant, 123 U. S., 335, 343, say:

> "The failure to annex a sworn copy of the government surveys to the petition is not a question of jurisdiction, but a matter relating merely to the form of procedure, which should have been objected to when the pleadings were *in fieri*, and the petitioners could have obtained leave to amend."

In Hawkeye Placer *v.* Gray Eagle Placer, (15 L. D., 45, 47), it was held:

> "The non-compliance in this case was with the requirement of a rule and should not be so strictly followed as to require an impossibility or to *work an injustice*."

And in Brown *et. al. v.* Bond, *et. al.*, (11 L. D., 150, 154), the Department said:

> "While the Secretary of the Interior has the power to establish rules and regulations to give effect to the provisions of the act which have all the force and effect of law, if not in contravention of it, yet the failure to comply with the technical requirements of the rules and regulations was a mere irregularity, and will not defeat the right the claimant to have the controversy settled by the appropriate tribunal if he has complied with the *statute*."

Again, all contracts, and relations growing out of them, must be *reciprocal*. If the selector in this case desired to withdraw his selection upon the ground that he had not filed a non-occupancy proof, and that, therefore, the contract was incomplete, is there any principle of law or equity that would permit him to do so? Would not the

Department and the Court say to him as was said in *re* Stimson, *supra*, and *re* Hyde, (31 L. D., 28), that his affidavit was not the only means of determining the character of the land, and that if the Government found the land to be "vacant land open to settlement" it could hold him to his contract?

If the Government can hold the selector to the contract, it necessarily follows that the selector can hold the Government.

In conclusion, we again suggest that the case presents the single and simple question of the power of the defendant to refuse patent upon the pretext that a non-occupancy affidavit was not filed, when he admits that the land when purchased was in fact unoccupied. We submit, as we said before, that the mere statement of the proposition demonstrates its absurdity and renders a consideration of the many matters treated of herein wholly academic. But, in view of the magnitude of the interests involved and the pendency of other cases, we have deemed it proper to present every aspect of the case.

Respectfully submitted,

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APPENDIX A.

Petroleum is not Mineral, Petroleum Lands are not Reserved From Purchase Entry Under the General Laws, and Under the Act of February 11, 1897, no Rights Attach Until Entry.

The Origin and Nature of Petroleum.

According to the prevailing scientific opinion petroleum is of organic origin—a product of the decomposition of fish and other aquatic animals.

All of the theories and opinions of the writers on the subject will be found collected and reviewed in Brannt's Petroleum, its History, Origin, Occurrence and Production. In view of the exhaustive treatment of the subject to be found there, it seems unnecessary to cite particular authorities here. We find, however, a recent article by the geologist of the State of Maryland on the reported discoveries of oil in this section, published in the Baltimore Sun, in which he states that the prevailing opinion as to the origin of petroleum is as we have stated above.

Originally, when its nature and origin were not so well understood, petroleum was known as "rock oil," and while it is yet popularly termed a mineral oil and has been so termed by some of the courts—even the Supreme Court of the United States—in cases where its classification as a substance or the application of the public land laws was not involved, it is apparent that such terminology has been used, for want of a better descriptive term, to distinguish it from the artificial oils popularly classed as animal and vegetable.

That the term mineral is not used as signifying *inorganic* origin is apparent from its use in scientific works where, at the same time, petroleum is said to be of *organic* origin. See, for instance, Fowne's Manual of Elementary Chemistry (1862) pages 540–541, where will be found a treatment of the subject in the light of the then existing knowledge of the substance.

Petroleum belongs in the Same Category as Water.

The Supreme Court in Ohio Oil Company *vs.* Indiana, 177 U. S. 190, has demonstrated the wide and unbridgeable distinction between liquid substances, irrespective of their chemical or physical classification, and the mineral substances contemplated by the mining laws and the reservation of minerals from sale or entry under the other land laws. The opinion of the court is too lengthy to make satisfactory quotation within the limits of this brief; but an examination of the case will show that the court places oil in the same category as water and holds that it is governed by the rules of law applying to water and not by the principles applicable to other mineral deposits and that (syllabus):

> "the owner of the surface has no property right in the gas or oil until he has actually reduced it to possession, or if he has any property right therein, it is a right in common with the co-equal right of other land owners to take from the common source of supply."

And in the previous case of Brown *vs.* Spilman (155 U. S. 665), it was said:

> "Petroleum gas and oil are substances of a peculiar character, and decisions in ordinary cases of mining for coal and other minerals *which have a fixed situs* can not be applied to contracts concerning them without some qualifications."

Lands Valuable for Petroleum are Not Mineral Lands.

The reservations of mineral lands in the public land laws were made before the discovery of petroleum deposits in this country, and if there is one thing clear from the letter and policy of the national mining laws it is that the substances contemplated there are such as have a fixed *situs* and a review of the legislation upon the subject will show that the substances contemplated by Congress as included within the term mineral (with the exception of coal, which is elsewhere specifically mentioned), are the metals and especially the precious metals.

A full history of the subject will be found in The Public Domain, 1883, pp. 306–331.

Up to 1848 copper, lead and iron were the only minerals which were contemplated by the reservations in the several laws, although gold and silver had been, through abundance of caution, reserved in the ordinance of 1785.

In 1850 the Attorney General held that public lands containing *iron ore merely* were not *mineral* within the act of 1847 for the sale of "copper, lead or *other valuable ores*" in the Lake Superior district, but were to be disposed of under the other laws.

In Mullan *vs.* U. S., 118 U. S. 271, the court recognized that it was doubtful if *coal* was *mineral* within the meaning of the reservation in the pre-emption act of 1841 and only resolved that doubt by the aid of a subsequent statute expressly declaring coal to be so reserved. They say:

> "The case, therefore, turns on the question whether coal lands are mineral lands within the meaning of that term as used in the statute regulating the disposition of the public domain.
>
> "The first statute which made any reference to minerals on the public lands was that of September 4, 1841, 5 Stat. at L. 453, Chap. 16, Sec. 10, which

provided that no pre-emption entry should be made on lands on which are situated any known salines or mines; and by the act of July 1, 1864, 13 Stat. at L. 343, Chap. 205, Sec. 1, it was provided that, '*Any tracts embracing coal beds or coal fields* constituting portions of the public domain, *and which as 'mines are excluded from the pre-emption act of 1841, and which, under past legislation, are not liable to ordinary private entry,'* might be disposed of at a price not less than twenty dollars an acre. This is clearly a legislative declaration that 'known' coal lands were mineral lands within the meaning of that term as used in statutes regulating the public lands, unless a contrary intention of Congress was clearly manifested. *Whatever doubt there may be as to the effect of this declaration on past transactions,* it is clear that after it was made coal lands were to be treated as mineral lands."

The discovery of gold in California and the rush of miners into that section induced the passage of the act of 1866 countenancing and regulating mining upon the public domain for individual profit and permitting entry and patenting of lode claims, followed by the act of 1872 amending the act of 1866 so as to permit the entry and patenting of placer claims, and the act of 1872 amending the previous acts. As incorporated in the Revised Statutes, the previous laws are found in Secs. 2318 et seq.:

R. S. 2318 reserves from sale, except as otherwise expressly directed by law, all lands valuable for *minerals.*"

By R. S. 2319, "all valuable mineral deposits in lands belonging to the United States," are declared open to exploration and purchase.

R. S. 2320 regulates mining claims upon "veins or lodes of quartz or other rock in place bearing gold, silver, cinnabar, lead, tin, copper or other valuable deposits."

And R. S. 2329 provides for the entry and patenting of

"claims usually called 'placers,' including all forms of deposit excepting veins of quartz or other rock in place."

In view of the familiar rule of interpretation limiting general terms to intend things of the same kind as those particularized, and especially in view of the opinion of the Attorney General, *supra*, it must be presumed that the general term "other valuable deposits," intends substances of the same mineral character as the particular substances specified, viz., gold, silver, cinnabar, lead, tin and copper.

And the term mineral being thus limited to metallic ores (with the addition of coal by express statute) we have a safe and certain classification.

None of the Federal courts have been called upon to determine the meaning and scope of the terms "valuable mineral deposits," "other valuable deposits," or "claims usually called placers including all forms of deposit." But the Supreme Court has, in two cases, defined lode and placer claims in language that leaves no room for doubt as to the understanding of that court with respect to the meaning of the terms "mineral," or "other valuable deposits."

In Reynolds *vs.* Mining Co., 116 U. S. 687, they say:

> "These varying provisions of the act of Congress as regards the two classes of mineral deposits and their surroundings are founded on the well known differences in their character. The veins, lodes or fissures mentioned in section 2320 are found in the surrounding rock, and are described and defined in the case of Iron Silver Co. *vs.* Cheesman, recently decided in this court. Placer mines, though said by the statute to include all other deposits of mineral matter, are those in which this mineral is generally found in the softer material which covers the earth's surface, and not among the rocks beneath. The one is only made available by following this vein into its stony case in the bowels of the earth, detaching and bringing it to the surface, and subjecting it to crushing, melting and other processes by which the precious metal is separated from the ore of which it is a part.

> In the other, the more usual way is take the soft earthy matter in which particles of mineral are loosely mingled and by filtration separate the one from the other. It is very clear that Congress considered that the vein of mineral-bearing quartz was more valuable than the surface or placer deposit; and it accordingly, when a patent was asked, fixed the price of the former at $5, and of the latter at $2.50 per acre, as represented by the superficial area of the survey."

And in United States *vs.* Silver Mining Co., 128 U. S. 679, they say:

> "By the term 'placer claim,' as here used, is meant ground within defined boundaries which contains mineral in its earth, sand, or gravel; ground that includes valuable deposits not in place, that is not fixed in rock, but which are in a loose state and may, in most cases, be collected by washing or amalgamation without milling.
>
> "By 'veins or lodes,' as here used, are meant lines or aggregations of metal embedded in quartz or other rock in place. The terms are found together in the statute, and both are intended to indicate the presence of metal in rock. . . . In Iron Silver Mining Company *vs.* Cheesman, 116 U. S. 533, a definition of a lode is given, so far as it is practicable to define it with accuracy, and it is not necessary to repeat it."

And an examination of the many decisions of the Supreme Court, particularly the opinions of Mr. Justice Field, the great mentor of the mineral law, will show that in speaking of the minerals contemplated by the public land laws they habitually use the term "precious metals."

See—

Buford *vs.* Houtz, 133 U. S. 320.
Forbes *vs.* Gracey, 94 U. S. 762.
Mining Co. *vs.* Mining Co., 143 U. S. 394.
Jennison *vs.* Kirk, 98 U. S. 457.
Erhardt *vs.* Boaro, 113 U. S. 527.
Iron Silver Mining Co. *vs.* Cheesman, 116 U. S. 529.
Sullivan *vs.* Mining Co., 143 U. S. 434.

And later legislation leaves no room for doubt as to the intent of Congress.

By the act of June 3, 1878 (20 St. 89), known as the Timber and Stone Act, Congress provided that land valuable chiefly for timber or stone might be sold, expressly reserving lands containing gold, silver, cinnabar, copper, or coal.

The Land Department regarded this act as not reserving such lands from entry under the general land laws; and on January 2, 1891, in Conlin *vs.* Kelly, 12 L. D. 1, held that building stone was not mineral, and did not render land containing it subject to appropriation under the mining laws, or except it from pre-emption entry, citing the act of 1878 as confirming this position, and adopting the definition of placers contained in Monax *vs.* Wilkinson, 2 Mont. 42, viz.: "Placers are superficial deposits which occupy the beds of ancient rivers or valleys."

The following year Congress passed the act of August 4, 1892 (27 Stat. 348) entitled—

> "An act to authorize the *entry* of lands chiefly valuable for building stone under the placer mining laws."

And providing—

> "That any person authorized to *enter* lands under the mining laws of the United States may *enter* lands that are chiefly valuable for building stone, under the provisions of the law in relation to placer mineral claims: *Provided*, That lands reserved for the benefit of the public schools, or donated to any State, shall not be subject to entry under this act."

And also extending the act of 1878 to all the public land States.

It will be observed that in this act of 1892, there is no declaration that stone is to be regarded as mineral and no reservation of lands containing stone from sale or entry under other laws. Accordingly on October 12, 1892, the

land department issued a circular under this act (15 L. D. 360), saying:

> "It is not the understanding of this office that the first section of said act of August 4, 1892, withdraws land chiefly valuable for building stone from entry under any existing law applicable thereto."

This was followed by the decision of February 13, 1892, in Clark *vs.* Ervin (16 L. D. 122) where the department held that land chiefly valuable for building stone was not, before the act of 1892, subject to placer entry or reserved from entry under the homestead and pre-emption laws; the decision of March 3, 1893, in South Dakota *vs.* Vermont Stone Company (16 L. D. 263) holding that lands chiefly valuable for building stone are not excepted as "mineral lands" from the grant to the State for school purposes; the decision of June 21, 1893, in Hayden *vs.* Jamison (16 L. D. 537), reversing the previous ruling in same case in 15 L. D. 276, and holding that land containing building stone is not excluded from agricultural entry, and that a homestead entry, though made for the purpose of securing the stone, is not of necessity made in bad faith; the decision of July 24, 1893, in re Delaney (17 L. D. 120), holding that a placer location prior to act of 1892 is not a legal appropriation of the land, and an intervening homestead entry will defeat the right of the placer claimant to perfect his claim under said act; the decision of December 19, 1894, in Clark *vs.* Ervin, on review (17 L. D. 550), holding that a placer location of land for building stone that fails, because unwarranted under the law when made, can not be validated by a subsequent discovery of some other material that is subject to entry under the placer law.

On August 27, 1896, Secretary Smith, in a well-considered decision in the case of the Union Oil Company (23 L. D. 222), held that petroleum is not a mineral within the meaning of the land laws.

Two days later Secretary Smith promulgated instructions

under the act of 1892, *supra* (23 L. D. 322), from which we quote:

> "By the timber and stone act of June 3, 1878 (20 Stat. 89), Congress provided for the disposition of the public lands chiefly valuable for timber or stone and unfit for cultivation. There can be no doubt but what land chiefly valuable for building stone could have been purchased under said act, if the appellant could have shown himself qualified, and shown that the land was unfit for cultivation and otherwise in such condition as to bring it within the purview of the act. Congress in passing the act of 1892 was directly dealing with the subject of the act of 1878; the second section of the act of 1892 extended the act of 1878 to the public land States. The language used in section 1 of the act of 1892 fails to show, either expressly or by implication, that Congress intended to repeal any part of the act of 1878. It is equally clear that Congress did not intend by said section for all purposes to place lands chiefly valuable for building stone in the same category as lands containing such minerals as gold, silver, cinnabar, copper, and the like. Lands valuable for such minerals are expressly reserved from sale except as otherwise expressly directed by law (Revised Statutes, Sec. 2318), and there is nothing in the section under consideration to show that Congress intended to place building stone on the same general plane with gold, silver, and other minerals. In other words, said section neither takes building stone out of the act of 1878, nor does it add such land to such as contain minerals. It in no way affects the status of land containing building stone. It simply opens up an additional and a new avenue whereby properly qualified persons may acquire title to such lands as contain this particular kind of stone, by permitting such lands to be entered under the placer mining law. The language used is:
>
> "That any person authorized to enter under lands the mining laws . . . may enter lands that are chiefly valuable for building stone under the provisions of the law in relation to placer mineral claims.

"It is not material to inquire for, or ascertain the reasons Congress may have had for extending to these persons the right to *make entry* of building stone lands under the placer mining laws. It is sufficient to know the extension has been made in clear, explicit language. It is equally clear that the extension is limited to the right to "enter" such lands. The language used shows that the right so given can only attach by the *entry*. Under the mineral laws a discovery and a location are both necessary, and in cases where title is sought they both must precede the entry. Mineral claimants who conform to the laws and regulations are protected in their possessory rights to their claims, whether they seek to make entry or not, so long as they comply with the law and regulations. The matter of entry is left optional with them. They secure their rights by discovery, location, performance of the required amount of labor on their claims. Under section 1 of the act under consideration a claimant for lands chiefly valuable for building stone can only secure a right to the land by making an *entry* thereof and the payment of the government price of the land.

"It follows that, in order to the exercise of the right of entry under section 1 of the act under consideration, and preceding the entry, a discovery will be necessary, and no right will attach in favor of the entryman until he makes an application to enter, describing it by legal subdivisions if on surveyed land.

"It does not follow that because the mere right of entry under the placer laws is extended to claimants of lands that are chiefly valuable for building stone, that such claimant is thereby invested with all the rights of claimants under the mineral laws. The building stone claimant is only invested with such rights as the statute gives to him, which can only become vested at the time he makes entry."

And on October 5, 1896 (23 L. D. 328), it was again held that prior to the passage of the act of 1892 there was no authority to locate and purchase lands valuable for building stone under the placer mining laws, and that under the pro-

visions of section 1 of that act no rights are secured prior to entry.

And thereupon Congress, as it had done with reference to stone, and with the departmental interpretation and administration of the act of 1892, *supra*, before it, passed the act of February 11, 1897 (29 St. 526), entitled:

> "An act to authorize the entry and patenting of lands containing petroleum and other mineral oils under the placer mining laws of the United States."

And providing—

> "That any person authorized to enter lands under the mining laws of the United States may enter and obtain patent to lands containing petroleum or other mineral oils, and chiefly valuable therefor, under the provisions of the laws relating to placer mineral claims: *Provided*, That lands containing such petroleum or other mineral oils which have heretofore been filed upon, claimed, or improved as mineral, but not yet patented, may be held and patented under the provisions of this act the same as if such filing, claim or improvement were subsequent to the date of the passage hereof."

And thereupon the Land Department issued a circular under this act (24 L. D. 183, 184), in which it said:

> "It is to be observed that though the provisions of the placer mineral land laws are by said act extended so as to allow the location and entry thereunder of public lands chiefly valuable for petroleum or other mineral oils, yet the substances named are not expressly stated to be mineral, in view of which it would appear that the prior assertion of a legal adverse claim to land valuable for petroleum or other mineral oils would preclude the acquisition of any rights thereto under the provisions of the mineral land laws.
>
> "Claims to lands of the character mentioned, heretofore initiated under the mineral land laws are

> by said act expressly confirmed, but this confirmation must, of course, be construed as applying only to cases where, prior to February 11, 1897, no valid adverse claim to lands involved had been acquired under other than the mineral land laws."

And on May 5, 1897, in Hayden vs. Jamison (24 L. D. 463), the department again held that no right attaches in favor of a placer claimant under the act of 1892 until he makes application to enter.

From the foregoing considerations two propositions are clear—

First. **The act of 1897 is a legislative recognition that petroleum is not mineral within the meaning of the land laws.**

As we have shown, this was the understanding of the land department at the time of its passage and as said by the Supreme Court in Midway Co. vs. Eaton (183 U. S. 692):

> "It is natural to respect the rulings of the Land Department upon any statute affecting the public domain, and if the rulings were contemporaneous with the enactment of the statute they afford a somewhat confident presumption of its meaning. *One of the reasons is that the Land Department may have recommended the statute—indeed may have written its words*, or, at any rate, were familiar with the circumstances which induced the legislation."

And when Congress, in the act of 1897, adopted the form and language of the act of 1892, in the light of its then uniform interpretation and administration by the Land Department, it is beyond question that the later act was intended to have the same meaning and application which had been given the former.

It is to be observed that in the act of 1897 there is no reservation of petroleum lands from entry under the general laws, and, as the Land Department properly held with respect to both statutes, this act merely provided an additional

method of acquiring title to petroleum lands, the reason of which is apparent when it is remembered that when the act was passed, the homestead law was the only general law by which title to non-mineral land could be acquired, and that law required residence and cultivation for five years, and limited a person to one entry.

When it is remembered that the price of placer ground is only $2.50 per acre, while no price is put upon the non-mineral lands of the public domain, and scrip which can be located upon such land sells for $4 or $5 per acre, it is apparent that there could be no public policy demanding the reservation of petroleum lands from settlement or from the operation of the forest reserve land exchange act of June 4, 1897, and that the Government, in exchanging even known petroleum lands at $2.50 per acre for land in its forest reserves of much greater value, would be striking a good bargain.

Second. No rights attach under the act of February 11, 1897, until application to enter.

The same considerations also apply here. The Land Department, as we have shown, had uniformly administered the building stone act of 1892 as giving no right in such land until application to enter and contemporaneously interpreted the act of 1897 in the same way; and, in view of the familiar rules of interpretation and the pertinent language of the Supreme Court in Midway Co. *vs.* Eaton, *supra*, there can be no doubt as to the soundness of our second proposition.

Furthermore the Supreme Court has declared the term "enter" or "entry" to mean the "filing of a claim with the register of the local land office." Chouteau *vs.* Pope (12 Wheaton, 587). See also Wisconsin Railroad Co. *vs.* Price (133 U. S. 497).

And when Congress has intended to extend the provisions of the mining laws generally to a subject to which

they were not previously applicable it has used apt language. By the act of January 12, 1877, (19 St. 221) saline lands, which, with mineral lands, had theretofore been reserved from sale under the general laws, were directed to be offered at public sale under certain conditions; but on January 31, 1901, Congress passed an act (31 St. 745), entitled "An act *extending the mining laws to saline lands*," and providing:

> "That all unoccupied public lands of the United States containing salt springs, or deposits of salt in any form, and chiefly valuable therefor, are hereby declared to be subject to *location* and purchase under the provisions of the law relating to placer mining claims: *Provided*, That the same person shall not *locate* or *enter* more than one claim thereunder."

Thus authorizing the location of claims on saline lands instead of merely authorizing entry at the local land office, as in the case of stone and petroleum. In the one case possession may be maintained and the salt extracted without entry and payment to the Government of the price of the land, while in the other the Government requires that applicants shall purchase the land itself and pay the Government price for it.

We might also refer to the act of March 3, 1891 (26 Stat. 1095), where, in legislating for Alaska, it is provided, in section 14, that the two preceding sections shall not be construed to warrant the sale of lands which shall contain "coal or the precious metals," and, in section 15, that townsite entries shall not carry title to any vein of gold, silver, cinnabar, copper or lead.

And the act of May 14, 1898 (30 Stat. 409, Sec. 2), which provided that nothing in that act should be construed to give the railroad company the ownership or use of "minerals, including coal," and in section 10 used the term "mineral or coal lands."

And the act of July 1, 1898 (30 Stat. 620), used the

expression "not mineral or reserved and not valuable for stone, iron or coal."

The Rulings of the Present Administration of the Land Department.

In view of all these considerations, the rulings of the present administration of the Land Department attempting to reverse the contemporaneous departmental interpretation of the acts of 1892 and 1897 and adopting the formula that mineral includes every substance which may make land more valuable for its extraction than for agricultural purposes, and holding that the act of 1897 is a legislative declaration that petroleum is mineral within the meaning of the mining laws, are such manifestly strained constructions of the several laws, unwarranted by their terms and by the spirit and intent of their enactment, as to be unworthy of notice. Even the present administration has found its attempted criterion of mineral character too broad and far-reaching to suit itself, and has felt compelled in King *vs.* Bradford (31 L. D. 466; Oct. 10, 1901), to hold that lands containing deposits of ordinary brick are not mineral lands within the meaning of the mining laws, though more valuable for such deposits than for agricultural purposes; thus demolishing its own formula and demonstrating the absurdity of venturing beyond the safe rule of limiting mineral, as plainly intended by the statutes, to include the ores or metals and coal, obtained by mining in the proper sense.

Respectfully submitted,

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FILE COPY.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1909.

No. 632

FILED
MAR 26 1910
JAMES H. McKENNEY,
Clerk.

THE UNITED STATES OF AMERICA ON THE RELATION OF THE RIVERSIDE OIL COMPANY, A CORPORATION,

Plaintiff in Error

vs.

RALPH A. HITCHCOCK, SECRETARY OF THE INTERIOR,

Defendant in Error

REPLY BRIEF OF PLAINTIFF IN ERROR

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Reply Brief for Plaintiff in Error

Counsel for defendant in error insist that the land department is a special tribunal acting judicially upon all matters affecting the public lands, and that its action in every such matter, whether right or wrong, is final and conclusive and cannot be interferred with by mandamus.

We reply:

First. That judicial action presupposes authority to render a final and conclusive judgment in some controversy between adverse parties.

Second. That the land department acts (*quasi*) judicially and finally only with respect to questions of fact.

Third. That due process of law requires that controverted questions of fact in the land department shall be determined by hearings before the local land officers conducted in accordance with the rules of evidence and procedure.

Fourth. That the land department has no power to determine controverted questions of fact upon *ex parte* affidavits.

Fifth. That the land department cannot act judicially with respect to questions of *law* because its determination of such questions is not final, but always subject to review by the courts.

Sixth. That in this case there was no controverted question of fact to be determined by the land department.

Seventh. That the defendant in error does not claim that in this case the land department determined any controverted question of *fact*.

EIGHTH. That the defendant in error properly held in the land department and now sets up in his answer that questions respecting the character of land selected are to be determined by the conditions existing at the time of selection.

NINTH. That the defendant in error admits that the lands in question at the date of selection were vacant lands open to settlement and subject to selection under the act of June 4, 1897.

TENTH. That the defendant in error acted solely upon the record of the selections supplemented by the uncontroverted fact that subsequent to the selections the land became occupied and known to be valuable for deposits of petroleum.

ELEVENTH. That the defendant in error claims only that the selections were defective and void on their face because of alleged lack of accompanying non-occupancy affidavit and that the subsequent and intervening occupation and discovery of petroleum rendered unavailing the supplemental non-occupancy affidavits filed after his first decision.

TWELFTH. That the action of the defendant in error in attempting to reject the selections for lack of accompanying non-occupancy affidavits was unwarranted and unlawful.

THIRTEENTH. That the defendant in error had no legal discretion to reject the selections and deny patent for such a cause.

FOURTEENTH. It being admitted that the land was subject to selection at the time of selection, and the question of accompanying affidavit being thus eliminated, the issuing of patent is a mere ministerial duty which will be compelled by mandamus.

These propositions are sustained in our opening brief, but we now desire to point out specifically the fallacy of the contention of counsel for defendant in error, and the

error into which the Court of Appeals of the District of Columbia fell in attempting to apply the doctrine contended for by counsel for the defendant in error.

THE INCONSISTENCY OF THE DEFENSE.

The defendant in error, in the land department, overruled the contention of his present counsel (Mr. Chapman, who there led the attack upon these selections), that no title, legal or equitable, can vest in a selector until approval of the selection by the Commissioner or the Secretary, but yet retains the same learned counsel to appear for him in these proceedings and make the same contention and argue that the ruling of the defendant in error, that the equitable title vests at the time of selection (which he also sets up in his answer), is erroneous; and the learned Assistant Attorney General for the Interior Department, who sat in this case and prepared the decision for the signature of the defendant in error also signs the brief for defendant in error, wherein the same erroneous contention is made in the effort to overrule the sound position taken by him in said decision and set up in the answer with respect to the time of vesture of the equitable title.

It is also to be remarked that counsel for the defendant in error in their attempt to overrule him in this respect, have been unable to satisfy themselves as to just what branch of the land department is to give the approval upon which they lay so much stress, but content themselves with the general statement that some adjudication of the selection by the *land department* is necessary to vest the title.

THE CERTIFICATE OF THE LOCAL OFFICERS.

It has been the uniform ruling of the land department and the courts that the certificate of the local land officers vests the equitable title for all the purposes of ownership—taxation, conveyance, dower, descent, etc.; but counsel for

defendant in error protest that this particular instance is an exception, and that there must be an adjudication by some higher authority, but do not attempt to say whether that authority is the Commissioner, or the Secretary, or both.

In the selections here, not only did the selector do everything that was required of him by the law, but the local officers gave their certificate and forwarded the papers to the General Land Office for patenting.

THE JURISDICTION OF THE LAND DEPARTMENT.

The equitable title thus acquired necessarily results in patent unless the Commissioner or Secretary, in the exercise of supervisory power, successfully attack it, by proper proceedings, for illegality, fraud or mistake.

The land department and the courts have uniformly held that *this supervisory power is limited to the investigation and determination, in proper proceedings, of conditions existing at the time the equitable title vested*, that is to say, when the entry or selection was made, and that, while the jurisdiction of the land department continues until patent issues, such jurisdiction is governed by the limitations upon the supervisory power of the Commissioner and Secretary.

Counsel for the above stated defendant in error, however, cite the authorities establishing these propositions, and they boldly conclude with the startling *non-sequitur*, that it is, therefore, clear that no title, legal or equitable, can vest until adjudication by the land department (Commissioner or Secretary, which?) that patent shall issue.

THE PROTESTS.

The Court of Appeals, *through misconception of the record and unfamiliarity with the procedure of the land department*, found a stumbling block in the protests; and counsel for the defendant in error, in the face of the admissions of the Secretary's answer, boldly assert in their brief that the pro-

tests showed that the protestants had absolute title to the lands in question with which even Congress could not interfere.

We think we have, in our opening brief, eliminated the protests from consideration in this case, but feel that this result will be rendered clearer by the following suggestions.

Two months after the selections were made, and after the cases had gone to the General Land Office for patenting, these so-called protests and affidavits (R. 26-54), were filed in the local land office alleging that certain persons had in June, 1899, made placer mining locations upon the lands selected and that their grantees were claiming possessory rights under said locations and developing the land for supposed deposits of petroleum, and praying that a hearing be ordered for the purpose of determining the character of the land, two of the protests also praying that further proceedings should be suspended until further development and operation should demonstrate the petroleum character and productiveness of the land.

Those protests were filed upon the theory that petroleum is a mineral within the meaning of the public land laws and that lands known to contain petroleum are mineral lands and therefore reserved from settlement; and that after selection under the act of June 4, 1897, the selected land remains open to exploration and development to the end that its character as mineral land may be subsequently determined. The protestants, of course, realized that, under such theory, discovery was essential to the establishment of the character of the land as mineral, and, being unable to allege specifically the existence of any known valuable deposits of petroleum at the time of selection in the protests and affidavits, made vague and general claim of discovery at the time of location of the alleged placer claims, not supported by any allegation of fact, and also claimed that the alleged locators or the Elwood Oil Co., a corpora-

tion, their grantee, had afterward sunk a prospect well upon each tract to a depth of about 120 or 130 feet which, as was claimed, showed traces of oil, but not alleged in such terms as, even if true, to amount to discovery.

Under the practice of the land department the function of the protests was not to assert any claim of the protestants for adjudication, but to admonish the Government that the land was valuable for supposed deposits of petroleum and, therefore, not subject to selection, and to induce the land department to take action against the selections, which, if it effected the rejection of the selections, would incidentally enure to the benefit of the protestants who were then in *forcible* possession of the lands.

MOTIONS TO DISMISS PROTESTS.

Under the practice of the land department with respect to protests, the selector filed motion (R. 55, 56) to dismiss these protests because as supported by the accompanying affidavits, they failed to allege facts sufficient to invoke the supervisory power of the land department to make an investigation as to the character of the land, in that the allegations of the affidavits, even if true, did not show discovery, within the meaning of the law, at or prior to the time of the forest lieu selections.

THE COMMISSIONER'S ACTION.

The Commissioner of the General Land Office, evidently regarding the showing made by the protestants as insufficient to justify the department in instituting proceedings against the selections, and desiring to be more fully informed as to the situation, caused an investigation to be made on behalf of the government by a special agent, whose report was and is held secret by the department. Then with these *exparte* papers (the protests and affidavits and the special agent's report), before him, the question for determination by the Commissioner was whether or not charges, in the

nature of an indictment or information, should be preferred against the selections to be tried before the local officers as a trial court governed by the legal rules of procedure and evidence.

On December 18, 1900, the Commissioner rendered a rambling decision (R. 57) full of erroneous statements and applications of the law and settled rulings of the courts, holding that the title of the selector could not vest until approval of the selections by the Commissioner and that, therefore, the land was still open to exploration under the mining laws and if at that date (one year after the selections), it could be shown to be mineral it would defeat the selections, *and concluding by directing the local officers to proceed under the instructions governing the manner of proceeding upon special agents' reports when the government desires to contest the validity of an entry* and to serve upon the selector a notice defining the charges against the selections and allowing the selector thirty days within which to apply for a hearing upon such charges, at which hearing the government would assume the burden of proof.

This decision in effect directed charges, based upon the special agent's secret report, to be preferred against the selections upon which the selector could apply for a hearing, at which hearing, under the Commissioner's ruling, the known condition of the land at the time of the hearing, more than one year after the selections, would be the issue.

APPEAL TO THE SECRETARY.

Thereupon the plaintiff in error, successor in title to the selector, caused an appeal to be taken to the defendant in error, Secretary of the Interior, assigning numerous errors in the Commissioner's decision (R., p. 72). This appeal, under the rules of the land department, operated as a supersedeas of the Commissioner's action, and the question before the defendant in error was, whether the Commissioner had

any authority to take any action other than to pass the selections to patent and whether or not charges could or should be preferred against the selections.

THE SECRETARY'S ACTION.

Thereafter on April 25, 1901, (R. 76) the defendant in error rendered a decision in the matter of said appeal wherein he held that *the title of the selector vests when he has done all of the acts required to make selection, and that questions respecting the class and character of the selected lands are to be determined by the conditions existing at the time selection is so made, and no change in such conditions subsequently occuring can affect the selector's title; that deposits of mineral must be known at the time of selection in order to defeat the selection; and that subsequent discovery will not affect the selector's title.*

The defendant in error thus reversed the principles announced by the Commissioner, but arbitrarily held that "vacant" in the act of June 4, 1897, means unoccupied; that it was incumbent upon the selector to show that the land was unoccupied; that the land department by a recital in an unpublished form of selection had established a regulation requiring the filing, as a part of the selection, of an affidavit showing the land to be non-mineral in character and unoccupied; that the selector had not perfected his selection because he did not show the land to be unoccupied by filing with the selections a so-called non-occupancy affidavit; that therefore the papers filed by the selector at the time of selection would not justify the issuance of patent even if no protest had been filed and that, in view of the alleged admitted subsequent occupancy by the protestants and known value of the land for petroleum, it was apparent that the required proofs could not be supplied; and therefore ordered the selections to be rejected and cancelled.

The defendant in error thus arbitrarily held that the selector had never legally selected the land, because he had

not filed a so-called non-occupancy affidavit; in other words, that there was no selection to prefer charges against, which ruling, of course, rendered unnecessary the determination of the question of whether or not charges against the selections could or should be preferred, or a hearing could or should be ordered to adjudicate the known character of the land at the time of selection, and in his said decision the defendant in error vacated the Commissioner's action, thus leaving unexpressed his views as to the propriety of preferring charges against the selections, but the language of his decision necessarily implies that he recognized the fact that at the time of selection no discovery of petroleum in the lands had been made and that the case presented only the question of the effect of admitted subsequent discovery.

Thereupon, under the rules of practice of the land department, the selector filed a motion for review of said decision, assigning numerous errors therein (R. 100) and also filed two supplementary affidavits alleging specifically that the selected lands were unoccupied at the time of selection (R. 103, 104).

Thereupon a decision upon said motion for review was prepared under the direction of the Assistant Attorney General, signed by the defendant in error and promulgated April 12, 1902 (R. 104), ignoring the said supplemental affidavits and adhering to and attempting to justify the former decision in rejecting the selections for lack of accompanying non-occupancy affidavit.

THE QUESTION PRESENTED BY THE SECRETARY'S ACTION.

This disposition of the selections by the defendant in error primarily presented the question of the authority of the land department to reject a selection because of alleged lack of accompanying non-occupancy affidavit, and, under

the contention of the defendant in error that the land department is a special tribunal to adjudicate the character of the land at the time of selection, such disposition of the selections was a refusal to assume jurisdiction and determine whether or not charges should be preferred against the selections to be heard and determined by such special tribunal, and in this aspect the case fell into the recognized category of cases where mandamus is the proper remedy to coerce an inferior tribunal or officer who refuses to act or assume jurisdiction for an insufficient or illegal reason.

Even under the contention of the defendant in error, however, as to the function of the land department, charges against the selections could not be lawfully preferred or a hearing lawfully ordered unless the department were in possession of information which would enable it to make formal and solemn charge that the land *at the time of selection was not vacant land open to settlement.*

And remembering that the land department, through its special agent, had made investigation of the situation, it is apparent that the defendant in error was in possession of the facts and in position to say whether or not the Government could lawfully or reasonably prefer charges against the selections based upon the known character of the land at the time of selection.

THE ALLEGATIONS OF THE PETITION FOR MANDAMUS.

To show that, under any view, the equitable title of the selector, vested absolutely at the time of selection, the petition was prepared in a form to meet the rulings of the land department and alleged, (par. 9, R. 8, 9) that at the time of selection the lands in question had been, by the Surveyor-General, returned as agricultural, and were shown on the books and records of the land department as and being agricultural, not reserved or otherwise closed to

settlement; that there was upon such records no filing, entry, or claim to the same; that there had been no discovery of mineral therein and no mineral was known to exist therein, and that the complete title to the same was in the United States and the United States were the sole and exclusive possessors and occupiers thereof as part of the vacant public land open to settlement; and (Petn., par. 23, R. 17) that there was no one present on the land at the time of selection, and that no claim adverse to the selector then existed; and (Petn., par. 21, R. 16) that the supplemental affidavits (Exs. W and X, R.), as to the non-occupancy of the land at the time of selection, were true in fact; and (Petn., par. 14, R. 12) that at the time of selection no person or persons had any right, title, or interest, either vested or inchoate, in or to the lands selected, and that the alleged locaters were mere pretended explorers for minerals and had made no discovery of mineral but merely staked off pretended mining claims; that the alleged locaters made no discovery of mineral upon said lands and acquired no possessory or other rights therein or thereto, and by the alleged attempted conveyances to the protestants, their grantees, the latter acquired no rights whatever in or to the lands, and that the protestants grantees, never themselves staked off, or restaked any claim or claims upon the lands, and set up no claim except under the pretended locations made by their grantors; and (Petn., par. 24, R. 19) that after the selections were made the protestants for the first time entered into possession of the selected lands.

The petition also, as inducement to the issuance of the rule to show cause, recited the proceedings in the land department subsequent to the selections, and set out the full record in exhibits with the petition so as to show the manner in which the selections came before the defendant in error, and the single and sole ground upon which he attempted to reject them, viz., alleged lack of accompanying

proof of non-occupancy, and alleged this single and sole ground for such action in the following language (par. 23, R. 16, 17):

> "The Secretary erroneously held and decided that the land selected was not vacant land, though in truth and in fact vacant and unoccupied, if such vacancy and lack of occupancy were not shown by an affidavit of selector made and filed by him and as a part of said selection; and erroneously held and decided that to be vacant land in the meaning of the act of June 4, 1897, the selected land must be not only free from the presence of any one on the land as a matter of fact, but must be *shown* to be free from such presence of any one on the land at the date of selection by an affidavit of selector made and filed by the selector *as a part of the record of selection*, and that notwithstanding the selected land at the time of selection was in fact unoccupied, nevertheless the selection was void, so the decision arbitrarily holds unless the said selection was when made then and there shown to be on unoccupied land by an affidavit of selector as a part of the record of selection."

THE PRAYER OF THE PETITION.

The petition prayed that the writ of mandamus should issue to the defendant in error commanding him to recall and vacate his order rejecting the selections, reinstate the proceedings relating thereto, proceed therein as required by law, and order the selections passed to patent.

It will be observed that this prayer comprised three progressive elements of relief: first, to recall the order rejecting the selections and reinstate the proceedings; second, to proceed in the matter of the selections, and lastly, to pass the selections to patent.

Assuming the rejection of the selections for lack of accompanying non-occupancy affidavit to be arbitrary and

unlawful, the first element of relief would follow as consequence, and the matter would be restored to its status as presented by the appeal from the Commissioner, and the question would be whether charges could or should be preferred against the selections based upon the known character of the lands at the time of selection. If not, then there remained no obstacle in the way of patents.

THE SECRETARY'S ANSWER.

The defendant in error, being in possession of full information through his special agent's report and otherwise, and having opportunity to deny in his answer the allegations of the petition as to the condition of the land at the time of selection or to set up as a defense to the petition that the interest of the Government required the preferring of charges against the selections based on the known character of the land at the time of selection, could not consistently traverse any of the allegations of the petition, or plead any such defense, and did not attempt to do so, but in his answer, by not questioning any of the allegations of fact in the petition, admitted all of the facts as alleged to be true.

In our opening brief (pp. 30 to 36) we cite authorities in support of the fundamental rule of pleading and now add Halloway v. Whiteley, 4 Wall., 522, where this court applied the rule in mandamus, saying (p. 532):

> "This position is untenable. It is averred in the petition, and not denied in the answer—and, therefore, as in other like cases of pleading is to be taken as conceded—that the application was filed with the Acting Commissioner."

This admission in the answer eliminated every question of fact, thus rendering charges against the selections uncalled for and a hearing unnecessary and improper, even from the standpoint of the defendant in error, and admitting that

the government has no cause to contest the character of the land at the time of selection.

It is contended by counsel for defendant in error that the character of land in such case can only be determined by an express adjudication by the land department, and that such adjudication must be had in all cases before patent can issue, but, as we will show, after a final entry or selection a hearing as to the character of the land will be had only by order of the Commissioner, and such order will be given only when sufficient ground appears.

The facts being admitted, it is apparent that a hearing, the object of which would be to determine the facts, would be an absurdity.

The ruling of this court in Duluth & Co. v. Roy, 173, U. S. 587, is pertinent here. Mr. Justice McKenna, speaking for the court says:

> "But it is urged defendant in error may not be able to make final proof, and that the land department, whose jurisdiction is exclusive, may determine the lands not to be swamp or overflowed. Neither supposition can be indulged. The findings by the court show full qualification in the defendant in error, and we cannot presume that the land department will find against the fact, which the state courts have found, that the lands 'were not at the time of the passage of the act of March 12, 1860, nor were they ever, nor are they now, swamp, wet, or overflowed, or unfit for cultivation.'"

THE SECRETARY'S DEFENSE.

The facts being thus admitted in the answer, after also reciting the proceedings in the land department, the defendant in error, having no other defense, set up merely the alleged lack of accompanying proof of non-occupancy as his *sole defense* to the petition and his *only reason* for refusing to order the selections to patent, in the following language (par. 10, R.):

"And this respondent denies that he has illegally or arbitrarily held or decided any matter or thing whatsoever in respect of the said application for selection, and he avers that by the laws of the United States the duty is imposed upon him to construe the acts governing the disposition of public lands of the United States and of applying the same to cases coming before him on appeal from the Commissioner of the General Land Office; that in pursuance of the duties imposed, he was required to construe and apply the terms of the act of Congress of June 4, 1897, wherein it was provided that the owner of land included within the limits of the public forest reservation might select in lieu thereof a tract of vacant land open to settlement, and that he accordingly did, in the exercise of his judgment and discretion in that behalf construe the said term 'vacant land open to settlement' to *exclude land in the actual occupation of any person or persons under the local customs or rules of miners*, which said customs and rules are by statute incorporated into and become part of the laws of the United States; that the Commissioner of the General Land Office, under the direction of the Secretary of the Interior, is authorized to enforce and carry into execution, by appropriate regulations, every part of the provisions of the laws relating to public lands; that in the exercise of this authority, it became and was his duty to make regulations to carry into execution the act of June 4, 1897, for the selection of lands included within the limits of the public forest reservation; *that in pursuance of such duty he did, under the direction of the Secretary of the Interior, by a form approved by the Secretary on March 9, 1899, make and establish a regulation for the execution of said law, which said regulation required that there should be submitted with the application to select an affidavit showing the lands selected to be non-mineral in character and unoccupied, and which said form of application was in force at the time when the attempted selections were made by the said Clarke;*

that the administration of the law relating to the selection of lands in lieu of lands included within the public forest reservation was wholly within the jurisdiction of the said Commissioner of the General Land Office under the direction of the Secretary of the Interior; that in the exercise of this discretion said Commissioner, in a proper proceeding for that purpose, passed upon and decided the right of the said selector, Clarke, to the land so selected, and that on appeal to this respondent as Secretary of the Interior, authorized and charged with the supervision of the public business relating to public lands, including mines, *this respondent held and decided that, by reason of the failure of the said Clarke to show in due and proper form that the said lands were at the date of said selection subject to selection as vacant lands open to settlement, the attempted selection thereof must be rejected;* wherefore it became and was unlawful for this respondent, as such secretary, or for the Commissioner of the General Land Office, acting under his direction, to order any patent or patents to the said lands to issue to the said Clarke as in the said petition prayed to be commanded."

THE ALLEGED REGULATION REQUIRING A NON-OCCUPANCY AFFIDAVIT.

The form, approved May 9, 1899 referred to, is set out in paragraph 8 of the petition (R. 7), and the portion relied upon by the defendant in error is also set out in paragaaph 2 of the answer (R. 122), as follows:

> "There are also submitted certificates from the proper office showing that the land relinquished, or surrendered, is free from encumbrance of any kind, also that all taxes thereon, to the present time, have been paid, and an affidavit showing the lands selected to be non-mineral in character and unoccupied."

This form had not been printed in any publication issued by the land department (See 28 L. D., 521, 523), and it

is alleged in the petition (Par. 17, R. 14) and admitted by the answer that, contrary to the custom of the land department where affidavits are required, no form of non-occupancy affidavit had ever been adopted or furnished by the land department for the use of the local land offices; that previous to May 4, 1898, the department had prescribed no form for selection under the act of 1897; and, after the issuance of the instructions of May 4, 1898, treated the recital of the filing of a non-occupancy affidavit as merely directory and not mandatory and *patented dozens of such selections in which no non-occupancy affidavit had been required or furnished.*

All that ever appeared in any publication of the land department on the subject was the following in the Circular of May 9, 1899 (28 L. D., 521), addressed to "Registers and Receivers of the United States Land Offices," viz., "*the forms of application (4-634) and (4-643), copies herewith, should be used in the classes of cases to which they respectively apply.*"

Unless this language—which gives no light to the public as to the contents of such form—together with the form itself, which recites that it is accompanied by a non-occupancy affidavit constitutes a valid regulation, then there is no such regulation, and none other is claimed.

A person intending to make a selection under such act would see such form of selection for the first time when he appears at the local land office to make his selection, and if then he is not presented by the local land officers with any non-occupancy affidavit for his signature, and his selection is accepted and entered of record, without requiring such an affidavit, and the register certifies that the land selected "is free from conflict and that there is no adverse filing, entry or claim thereto," as was done in this case, he would certainly be justified in supposing that no further affidavit was required of him.

We assert with the utmost confidence, that no regulation of the department requiring the filing of a non-occupancy affidavit as a part of a selection under the act in question *ever existed;* that if it had existed it would have been *void*, as enlarging the requirements of the statute, and imposing a burden and exacting a condition not authorized by the statute; and further, that even if such a regulation ever existed, and even if it were a valid regulation, the department by its practice in the administration of this statute has *waived its requirements*, and is by its own conduct estopped from exacting compliance with it in this case.

We ask the court's special attention to the exhaustive discussion of (1) *the existence*, (2) *the legality*, and (3) *the waiver* of this alleged regulation requiring this non-occupancy affidavit contained in appellant's brief in Equity Cases Nos. 217 and 218, argued herewith, on pages 135 to 167 thereof, and would like to have such discussion considered a part of this brief. But on the subject of the waiver of such alleged requirement by the previous practice of the department, we here call the court's attention to the fact—

First, that no non-occupancy affidavit was ever furnished by the land department to the local land officers, for use under this act, until more than a year and a half after these selections were made; and, second, that the practice of the land department (of which this court will take judicial notice) was not to require such affidavits, and the records of the land department show that hundreds of patents had been issued under this act before the decision in this case, where no such affidavits were required or filed, and that the majority of patents theretofore issued under this act, were of this character, and no selections had ever been rejected for lack of such an affidavit.

The fact is, that about the only selections under this act that were accompanied by affidavits containing a non-occu-

pancy clause, were a few in which such affidavits had been prepared and printed by private dealers in forest reserve lands, before the department's practice on the subject was established; and as it soon became well known that the government was not furnishing or requiring such affidavits and was issuing patents without such affidavits, it became the custom of such dealers to strike out the non-occupancy clause from their printed form of affidavit, just as was done in this case.

To exact such an affidavit for the first time, in this case, nearly a year and a half after Clark's selections were made, and to refuse to permit Clark to supply such affidavits later, as of the date of the selections, and to reject and cancel such selections on that ground—although the selected land was admittedly unoccupied when selected—is so obviously arbitrary and unlawful, as to need no further comment from us.

It is an axiom of English jurisprudence that "freemen can endure an unjust law, but an uncertain law, dependent upon arbitrary official rulings, is intolerable."

THE QUESTIONS PRESENTED BY THE MANDAMUS RECORD.

It thus appears, as admitted fact, that at the time of selection the land was non-mineral, wholly unoccupied in fact, and admittedly subject to selection, even under the defendant in error's attempted construction of the act of June 4, 1897, and that the sole ground of his refusal of patent is the alleged failure on the part of the selector to file at the time of selection a so-called non-occupancy affidavit; which ground of refusal the defendant in error attempts to justify upon the plea that in the exercise of what he called uncontrollable discretion he has construed the term "vacant" in the act to mean "unoccupied," and, by a mere recital in an unpublished form, established a

regulation making the filing of such non-occupancy affidavit a condition precedent to the operation of the statute; and there is no other question presented in the case.

And at the argument of the cause in the court of first resort, counsel for the defendant in error, in open court, confirmed this statement of the issue, saying (R., p. 133):

> "The issue in this case, if your honor pleases, is not an issue between the selector and the protestant or the contestant in any sense; it is an issue between the selector and the United States. The protestant is not in this court, in any way direct or indirect. He was not in the land department in respect to the matter which we have here to consider, except as a means of informing the United States that the land which the selector attempted to take under this act was not subject to be taken under that act."

As to the effect of the answer in binding the respondent to the defenses pleaded, the language of Mr. Justice Bradley (in U. S. *vs.* Payne, 30 Wash. Law Rep., 338) is pertinent.

Judge Bradley says:

> "It is not claimed that the *statute* in all its requirements has not been complied with. No part of the requirements of the *statute* is indicated as to which there has been non-compliance; but the record shows that the certificate of entry has been cancelled and the right has been revoked and the publication has been excluded from the mails for the *reasons*—and these are the only *reasons*—and as has been stated they must be held to be the *sole* reasons—that the principal feature of the publication is 'that of a reference book and not that of current news or miscellaneous literary matter.' The question of the failure to comply with the requirements that it should be 'current news or miscellaneous literary matter' has been disposed of by the decision *that the regulation imposing this additional requisition upon such publications is void* and is beyond the power of the Postmaster-General."

Taking this language with that contained in the West case, *supra*, that "the return should be an answer or statement of the facts showing the *grounds* upon which the respondent has acted or refused to act," and it is perfectly clear that the defendant will be confined to the "reasons" and the "grounds" given for his action in his answer.

In Barney *vs.* Dolph, 97 U. S., 652, 656; Simmons *vs.* Wagner, 101 U. S., 260, 261; Dibble *vs.* Land Co., 163 U. S., 63, 74, this court said:

> "Where the right to a patent has once become vested in a purchaser of public lands, it is equivalent, so far as the Government is concerned, to a patent actually issued. *The execution and delivery of a patent after the right to it has become complete are mere ministerial acts of the officers charged with that duty.*"

There is no question as to the soundness of the general rule laid down in Benson M. & S. Co. *vs.* Alta M. & S. Co., 145 U. S., 128, namely, that:

> "It is a general rule in respect to the sales of real estate that when a purchaser has paid the full purchase price his equitable rights are complete and there is nothing left in the vendor but the naked legal title which he holds in trust for the purchaser. And this general rule of real estate law has been repeatedly applied by this court to the administration of the affairs of the land department of the government; and the ruling has been uniform, that when in cash sales the price has been paid, or in other cases all the conditions of entry performed, the full equitable title has passed and only the naked legal title remains in the Government in trust for the other party, in whom is vested all the rights and obligations of ownership."

Applying this doctrine to the statute here under consideration (the act of June 4, 1897), it cannot be questioned that if an owner of lands "included within the limits of a

public forest reservation" relinquishes the same to the Government by a good title and selects "in lieu thereof a tract of vacant land open to settlement not exceeding in area the tract relinquished," he has thus paid the full purchase price for the selected land and "all the conditions of entry are performed," and hence "the full equitable title is passed."

THE ACTION OF THE COURTS BELOW.

The court of first resort filed no opinion in the case, but merely entered an order overruling the petitioner's demurrer to the defendant's answer, and upon motion for rehearing adhered to such action and entered a judgment dismissing the petition.

THE COURT OF APPEALS HELD THE REQUIREMENT OF NON-OCCUPANCY PROOF UNWARRANTED.

The Court of Appeals in its opinion (R. 142), upon the authority of Whitney *v.* Taylor (158 U. S., 85), held that the land department had no authority to require a selector to accompany his selection with an affidavit to the effect that the land was non-mineral or unoccupied; thus overruling the defense pleaded by the defendant in error, and this, as we have shown, being the defendant in error's only defense, not only to reinstating the selections as cases pending before him, but as well to passing them to patent, the judgment of the Court of Appeals should have been a reversal of the judgment below with direction to issue the writ commanding the defendant in error to reinstate the selections and pass them to patent.

THE ERROR OF THE COURT OF APPEALS.

But the Court of Appeals, through misconception of the case presented by the pleadings, assumed that the protestants had made *entry* of the lands in question under the act of February 11, 1897, prior to the selection thereof by

Clarke (R. 142); that there had been a contest in the land department between the protestants claiming under the act of February 11, 1897, and the selector claiming under the act of June 4, 1897, that proof had been taken, and that, even though there may not have been a formal contest, the action of the defendant complained of was a final determination of the matter against the selector, and held that the court had no jurisdiction to control the discretion of the defendant in error in so disposing of the matter and affirmed the judgment of the court below, saying (R. 143):

> "Upon these authorities, it is very clear that, if there was here a contest between different claimants of the land, the land office had jurisdiction to adjudicate and determine the contest; and that, if there was no formal contest between rival claimants, yet it was still within the jurisdiction of the land office, in view of the protests that had been filed and of *the proof that was taken*, to determine whether the land selected by Clark was 'vacant land open to settlement.' If it decided the controversy erroneously, if it made a mistake in its definition of what constituted 'vacant land open to settlement,' if it attached undue value to the protests, if it failed to inform itself fully in regard to all the circumstances, yet, as the case was within its jurisdiction, such consideration cannot be inquired into or reviewed in a collateral proceeding, least of all, in a proceeding for the writ of mandamus, the use of which is limited to the enforcement of a merely ministerial duty and to the protection of a plain, admitted, and unquestioned legal right that has been arbitrarily or without due warrant of law denied."

The protestants never made any entry of, or application to enter, the lands in question.

As we have shown, the Court of Appeals unaccountably, in the face of the certificates of the local officers and the admitted allegations of the petition to the contrary, assumed

that the protestants, or some of them, had made *entry* of the lands under the act of February 11, 1897.

To "enter lands," as the term has been used in the public land laws from the beginning, is to purchase, or make application for, lands at the United States local land office.

Chotard *v.* Pope, 12 Wheat., 586.
Lockwitz *v.* Larson, 52 Pac., 279.
Sturr *v.* Beck, 153 U. S., 541, 547.
Dealy *v.* U. S., 152 U. S., 539, 544.
Hastings & D. R. Co. *v.* Whitney, 132 U. S., 357, 363.
Tarpey *v.* Nadsen, 178 U. S., 215.
Gilbert *v.* Spearing, 4 L. D., 463, 465-6.
Iddings *v.* Burns, 8 L. D., 224, 226.

> "An entry is that act by which an individual acquires an inceptive right to a portion of the unappropriated soil of the country by filing his claim thereto with the proper land officers of the United States."
>
> Secretary Chandler to Commissioner Williamson, 2, Copps Pub. Land Laws, 1882, p. 869.

As entry can be made only at the United States local land office and no entry or application to enter was ever made by the protestants, it is evident that the Court of Appeals merely erred in supposing the record showed that an entry had been made, or else through unfamiliarity with the land laws and procedure thereunder, assumed that staking off a mining claim on the land or filing a notice of location of such a claim in the county recorder's office (not the United States land office) was an *entry*.

THE FILING OF NOTICE OF LOCATION IN THE COUNTY RECORDER'S OFFICE WAS A MERE NULLITY.

As we have shown in our opening briefs in this case and in Equity Cases Nos. 217 and 218, discovery is the *sine qua*

non to a valid mining location, and in the absence of lawful discovery the marking of boundaries and the filing of notice in the county recorder's office are ineffectual for any purpose.

A notice of location is not even evidence of any fact recited in it.

Magruder *v.* O. & C. R. R. Co., 28 L. D., 174.
McQuiddy *v.* State of California, 29 L. D., 181.
Elda. M. *v.* M. Co., 29 L. D., 279.
Harkrader *v.* Goldstein, 31 L. D., 87, 93.

The utmost effect of a notice of location on file in the county recorder's office could only be to *caveat* the public to examine the land to see if there had been discovery of mineral thereon which would validate the claim.

Here it is admitted that at the time of selection by the selector no discovery had been made on the land and that no one was even occupying or in possession of it. So that the alleged mining claims had no existence in law and the notices of location were mere nullities.

MR. JUSTICE WHITE'S INQUIRY OF MR. VAN NESS CONCERNING THE FOREST LIEU SELECTOR FINDING THE PLACER MINING LOCATOR'S MINING LOCATION OF RECORD IN THE COUNTY RECORDER'S OFFICE.

Upon the argument of the Equity Cases, Nos. 217 and 218, Mr. Justice White asked Mr. Van Ness if when the selector under the forest lieu land act came to the county recorder's office to place his deed of relinquishment to the United States of record, he would not find there the notices of location of the placer mining claims. The response to this was that the deed of the relinquished land would be recorded in the county in which the relinquishment was

situated, which might or might not be in the county in which the placer mining locations were recorded. It is wholly immaterial, however, whether the selector should find such placer mining locations of record or not, as they would not import notice of anything. Not being evidence they would not affect the presumption growing out of the Surveyor General's return that the land was agricultural in character. If valuable mineral deposits had been discovered on the land this fact would preclude a valid selection being made. It is, therefore, apparent that the selector's rights would depend, not upon the question as to whether the land was *claimed* for mining purposes, but solely upon the question as to whether or not valuable mineral deposits had been discovered upon the land.

Can the power of the Government to convey its own lands be lessened by unauthorized acts of third persons?

The law declares that no location of a mining claim shall be made until discovery of mineral deposits within the boundaries of the claim.

If one mark off a so-called mineral claim on public land of the United States, in which valuable mineral deposits have not been found, he violates the law. If he post notices of such location at the corners of such a tract he violates the law. And if he file such notices in the county recorder's office he violates the law. Do these several violations of the law diminish the power of the United States to convey to others lands so claimed? If, by reason of these so-called claims no one can buy the public land, it follows that the Government's power to sell is thus extinguished. This cannot be.

Mineral locations cannot be, and are not in law, upheld by any theory, however strong, of the presence of minerals, nor by the actual undiscovered mineral character of the land.

Dughi *v.* Harkins, 2 L. D., 721.

Davis *v.* Wiebold, 139 U. S., 507.

All indications of mineral are so delusive and theories so misleading that the law accepts no land as mineral until it is demonstrated to be mineral by the actual discovery or production of valuable mineral. In other words, courts do not rest their judgments as to the character of land on hypotheses, hopes, fears, or beliefs, but only on known facts in being.

THE FILING OF THE PROTESTS DID NOT INITIATE A CONTEST.

The Court of Appeals, apparently through unfamiliarity with the procedure of the land department, assumed that the mere filing of the protests initiated a contest, but later, being doubtful about this proposition, qualify it by saying that if there was no formal contest the result is the same.

That the mere filing of the protests did not and could not initiate a contest is apparent upon reference to the rules of practice of the land department set out on pages 20 and 21 of our opening brief.

See also Travis against Perry, 15 L. D., 23, 25; where it is said:

> "But in this case there was no contest for him to appear to, for the filing of an affidavit of contest without action thereon by the proper authority, does not constitute a pending contest."

THE PROTESTANTS WERE RECOGNIZED BY THE LAND DEPARTMENT MERELY AS INFORMERS.

The protestants here, however, were not recognized by the land department as claimants desiring to contest but as mere informers.

See admission of counsel for defendant in error in the argument in the court of first resort. (R. 133), quoted by us *supra*.

A clear definition by Mr. Justice Brewer of the status of a protest will be found in Wight *v.* Dubois (21 Fed., 694).

The titling of papers in the matter of the selections, as Kern Oil Co. *et al. v.* C. W. Clarke or C. W. Clarke *v.* Kern Oil Co. *et al.*, has no significance as indicative of a pending controversy, but is merely in accord with the practice of the land department with respect to titling cases in which protests are filed.

As we have shown, the protests were filed upon the theory that if the lands could thereafter be shown to be valuable for deposits of petroleum they would be mineral in character and, therefore, not subject to selection; and the prayer of the protests is that a hearing be ordered to determine the character of the land.

While two of the protests also pray that it be adjudged that the protestants are the owners of and in possession of the land, and that it was withdrawn from entry under the act of June 4, 1897, and also use the terms contest and contestants interchangeably with protest and protestants, it is to be observed, as we have said, that the validity of possessory mining claims depends upon discovery and known existence of valuable mineral deposits (O'Reilly *v.* Campbell, 116 U. S., 418; King *v.* Amy & Silversmith Cons. M. Co., 152 U. S., 522); and if the validity of the selections depend upon the non-petroleum character of the land a determination that the lands were known to be valuable for petroleum at the time of selection would dispose of the selections through their own inherent weakness without regard to the existence or validity of alleged possessory mining claims. In other words, the material fact is the known mineral or non-mineral character of the land, which is a question between the Government and the selector, and a protest filed by a claimant of a possessory right has no greater standing than one filed by a stranger

to the land, who calls its alleged mineral character to the Government's attention.

Accordingly, the Commissioner treated the protestants as mere informers admonishing the Government as to the alleged mineral character of the land, and evidently regarding the showing of the protests as insufficient to invoke action by the department against the selections, and desiring to be fully informed as to the situation, caused an investigation to be made by a special agent on behalf of the Government, whose report is held secret in the department, and

The Commissioner did not allow or order a contest based upon the protests, but ordered proceedings initiated on behalf of the Government based upon the special agent's report.

As will appear from the closing paragraphs of the Commissioner's decision (R. 71), the action taken by him was not under the rules of practice relating to contests, which we have quoted, but under the rules regulating proceedings instituted by the Government against entries or selections, which rules are as follows (Instructions of August 18, 1899, 29 L. D., 141):

> "To Registers and Receivers of United States District Land Offices.
>
> "Gentlemen: The following rules are prescribed for the government of all parties concerned in proceedings arising on reports of special agents affecting the validity of claims to public lands, viz.:
>
> "1. Hereafter, when there is filed in this office a report of a special agent alleging that a certain entry, filing, location, or claim for a specified tract of public lands, is fraudulent, or illegal, or that the claimant has failed to comply with the requirements of law, and the facts presented are sufficient, if true, to warrant the cancellation of the entry or claim, the proper local officers will be promptly advised thereof, and will be directed to serve notice upon

the entryman or claimant in the following manner:

"2. The notice must specifically define the charges contained in the special agent's report adverse to the entry, filing, location, or claim; and the entryman or claimant shall be advised that he will be allowed thirty days within which to apply for a hearing, and that a failure to apply for such hearing within the prescribed time will be taken as an admission of the truth of the charges.

"3. Said notice must be served personally, or, in cases where evidence is submitted to this office showing that due diligence has been used by the local officers and the special agent, and the party or parties cannot be found, notice by publication, in accordance with Rules 13 and 14 of Practice, may be specially authorized and directed by this office.

"4. If the entryman or claimant applies for a hearing the local officers will promptly forward the application to this office when, at as early a day thereafter as practicable, a special agent will be assigned to represent the Government at the trial, and the local officers will be directed to confer with him and agree upon a day therefor, of which they will duly notify all parties in interest, and otherwise proceed as provided by the rules of practice governing contest cases.

"5. Upon the termination of the hearing (*at which the burden of proof will be assumed by the Government*) the local officers will, without delay, make their finding and recommendation in the case, duly notify the defendant thereof as in other cases (Rule 44, Practice), and, upon the expiration of the time allowed for appeal, transmit the record to this office.

"6. In cases where the entryman or claimant, after due notice, fails to apply for a hearing within the time allowed, the local officers shall, at the expiration of the prescribed time, render decision as in other *ex parte* cases. The failure of the entryman or claimant to answer to the charges shall be taken as an admission of their truth, obviating the necessity of submitting evidence in support thereof.

"7. Notice of such decision shall be given the entryman or claimant by the local officers as in other cases (Rule 44 of Practice), allowing the usual time for appeal. If, at the expiration of the time allowed no appeal has been filed, the case shall be transmitted to this office to be disposed of in the same manner as other *ex parte* cases.

"8. Hereafter no entry, filing, location, or other public land claim will be canceled upon allegations contained in a special agent's report, except upon proper evidence that the entryman or claimant had notice of the charges against the same, either by personal service of notice or after due and proper notice has been given by publication under Rules 13 and 14 of Practice.

"9. Instructions of November 4, 1895 (21 L. D., 367), relative to hearings ordered upon special agents' reports will remain in full force and effect where not in conflict herewith, but all instructions relative to any proceedings upon special agents' reports inconsistent herewith are hereby recinded.

"10. All notices to be served on entrymen or claimants under these instructions must likewise be served on transferees or mortgagees, where such transferees or mortgagees are of record as parties in interest in the local land office or in the General Land Office."

THE PROCEEDINGS ORDERED BY THE COMMISSIONER WERE NOT INSTITUTED, HOWEVER, BECAUSE HIS ACTION WAS SUPERSEDED BY APPEAL THEREFROM TO THE SECRETARY.

As we have shown, the action of the Commissioner in ordering proceedings instituted was based upon the erroneous theory that discovery of mineral subsequent to selection and before approval by him, would defeat the selections, and, as the affidavits filed by the protestants

failed to show discovery at or previous to the selections, and as the special agent could not, in the face of the well-known facts to the contrary, be presumed to report that valuable deposits of petroleum had been discovered in the lands at or prior to selection, the selector appealed to the Secretary, and, under the rules of practice of the department, such appeal operated as a supersedeas of the Commissioner's action in ordering proceedings instituted on behalf of the Government; and the question presented before the Secretary was whether subsequent discovery could affect the selections, and, if not, whether, in view of the palpable insufficiency of the protests, and being presumably in possession of the true facts through the report of its special agent, the Government could or should institute proceedings against the selections.

THE COMMISSIONER DID NOT "PASS UPON AND DECIDE THE RIGHT OF THE SELECTOR TO THE LANDS SELECTED" AS STATED IN PARAGRAPH 10 OF THE DEFENDANT'S ANSWER.

As the decision of the Commissioner appears in full in the record and shows that the action of the Commissioner was limited to directing charges to be preferred against the selections, as we have shown, and as the defendant in paragraph 5 of his answer (R. 124) alleges that the Commissioner decided that the allegations made in the protests should be investigated at a hearing to be conducted in accordance with the following principles, etc., it is apparent that this later allegation in the answer is a mere inadvertness or at most an erroneous conclusion inconsistent with the previous allegation and not an allegation of fact well pleaded, even were the point material.

That the land department cannot adjudicate the character of land upon *ex parte* affidavits is declared by R. S. 2335:

> "All affidavits required to be made under this chapter may be verified before any officer authorized to administer oaths within the land district where the claims may be situated, and all testimony and proofs may be taken before any such officer, and, when duly certified by the officer taking the same, shall have the same force and effect as if taken before the register and receiver of the land office. *In cases of contest as to the mineral or agricultural character of land, the testimony and proofs may be taken as herein provided on personal notice of at least ten days to the opposing party;* or if such party cannot be found, then by publication of at least once a week for thirty days in a newspaper, to be designated by the register of the land office as published nearest to the location of such land, and the register shall require proof that such notice has been given."

and, under the practice of the land department, every controverted question of fact is sent to the local officers for a hearing.

NO PROOF WAS TAKEN IN THE LAND DEPARTMENT.

The Court of Appeals assumes and states in its opinion that *proof* was taken in the land department and here again plainly erred in supposing that the record showed that a hearing before the local officers had been had, in which testimony had been taken, or else, through unfamiliarity with the limitations upon the powers of the land department and the necessity of due process of law in determining issues of fact by formal hearings before the local officers, supposed that mere *ex parte* protests and affidavits were *proof* upon which the land department could lawfully adjudicate the rights of adverse parties.

The land department is as much bound by the rules of evidence as the courts, and cannot destroy a vested right secured by entry or selection without due process of law, which, under its rules of practice to which we have referred, consists of the service of a notice in the nature of an information or indictment and a trial or hearing before the local officers where witnesses are examined and cross-examined.

The protests and affidavits were, as we have shown, mere *ex parte* communications to the Government required by the rules of practice to be sworn to as an assurance of good faith.

Ex parte affidavits are mere hearsay (1 Enc. Pl. and Pr., 335).

The *quasi* judicial functions of the land department in determining issues of fact cannot be exercised upon *ex parte* affidavits. As said in *ex parte* Sutley, 3 L. D., 248-250:

> "*An affidavit is not evidence; it is merely a formal assurance of good faith on the part of the affiant,* while a deposition, properly taken, is as much the evidence of the deponent as though he were in the presence of the court, and there subjected to an oral examination. *Thus an affidavit,* whether appearing in the verification to a pleading, or in support of an interlocutory proceeding, *is not, in fact or by intent, effective so far as the final judgment is concerned; but upon the matters appearing in a deposition the final judgment may safely rest.*"

The Secretary did not and could not, upon the case presented by the appeal from the Commissioner's action, determine that the lands in question were not vacant lands open to settlement at the time of selection.

He determined no controverted question of fact adverse to the selector, and, as we have shown, could not do so upon the record before him, but acted solely upon the

record of the selections supplemented by the *uncontroverted* fact that after the selections by Clarke the protestants had gone into possession of the lands and made discovery of petroleum therein, and, instead of deciding that Clarke's record title was destroyed by conditions *dehors* the record at the time of selection, as the vague language of the Court of Appeals would seem to imply that they assumed, the defendant in error merely decided that Clarke had not acquired a record title, because the record itself was fatally defective in not containing accompanying non-occupancy proof.

THE SECRETARY DID NOT EXERCISE, AND DOES NOT PLEAD THAT HE EXERCISED, QUASI-JUDICIAL FUNCTIONS IN DETERMINING ANY QUESTION OF FACT AFFECTING THE SELECTIONS.

The Court of Appeals erroneously assumed that the defendant in error pleads that the land department adjudicated the character of the land adversely to the selector, but, as we have shown, the selections came before the defendant in error upon the question of whether or not the department should prefer charges against them and raise an issue of fact and thereby invoke the *quasi*-judicial function of the local officers to hear and determine the matter so put in issue.

The Court of Appeals failed to distinguish the administrative function of the land department from its *quasi*-judicial function. The department acts *administratively* in determining whether charges shall be preferred and its *quasi*-judicial jurisdiction does not attach until a *case* is presented by service of a notice of charges upon the entryman or selector. This notice is the jurisdictional authority corresponding to the original writ at common law.

The defendant in error, however, acting administratively and not judicially, inspected the record, supplemented by the uncontroverted fact of subsequent discovery of petroleum, and rejected the selections for a supposed fatal defect in the selector's record of selection, and this is the only defense he pleads and the only reason he offers for refusing to order the cases to patent.

The Court of Appeals held that the requirement of proof of non-mineral character and non-occupancy was without warrant of law, and so disposed of the sole ground of the defendant in error for rejecting the selections. They say, however, that it became the right and probably was the duty of the land office to investigate the condition of the land and to ascertain whether such condition remained in fact what it purported to be on the records of the office, and apparently assume that an investigation of the character of the land was made and that an adjudication adverse to the selector resulted.

It is apparent that the Court of Appeals merely erred in their understanding of the proceedings in the land department, or else assumed that the action of the defendant in error in rejecting the selections for an unwarranted reason was *res judicata* of every question which might have been adjudicated by the land department. As we have shown that the selections had not reached a stage where the condition of the land had been put in issue, and that the question presented to the defendant in error was the administrative one of whether the condition of the land should be put in issue for adjudication, it is apparent that if the Court of Appeals attempted to apply any supposed doctrine of *res judicata* they failed to see that jurisdiction in the defendant in error to determine any issue of fact against the selector did not exist upon the record before him, and could not arise until there should be charges preferred against the selections, a hearing of the issue before the local officers, a

decision by them, an appeal to the Commissioner, and ultimately an appal from him to the Secretary.

THE REMEDY.

We maintain that the pleadings in this mandamus proceeding clearly show that Clarke, petitioner's grantor, had fully complied with the statute, and had acquired the complete equitable title to the selected lands, and that the right to a patent was fully vested; but such patent was arbitrarily withheld by the Secretary of the Interior upon the sole ground that Clarke did not at the date of his selection comply with the provisions of an alleged regulation, which is absolutely void, and we submit that in such a case mandamus will lie.

We understand the law to be in full accord with the views of the Court of Appeals of this district expressed in the recent case of West *v.* Hitchcock, 30, Washington Law Reporter, 186, namely, that—

> "The fact that the act which mandamus seeks to compel is the culmination of a series of proceedings, or is of a judicial or *quasi*-judicial nature, or is an act in the course of such proceedings, does not exempt it from judicial control by the courts through the writ of mandamus *when the officer or person charged to perform it arbitrarily and without just legal cause refuses such performance.*"

In that case *approval* by the Secretary of the Interior of a selection of land was involved. In this case, the *patenting* of a selection of land is involved. The acts in each case are equally ministerial, if the *right* of the party is equally clear.

We call the court's attention to the recent decision of the Court of Appeals of this district in the case of National Railway Pub. Co. *v.* Payne, Postmaster General, 30, Wash. L. R., 791, wherein it was held that mandamus would lie

against the head of a department whenever it appeared that a party had fully complied with all the requirements of the statute, and that his plain statutory rights were denied him merely on account of his non-compliance with a void departmental regulation exacting requirements not imposed by the statute.

In the course of the opinion, page 793, the court says:

> "The citizen who desires to have his publication carried in the mails of the United States as second class mail matter and who has fully and fairly complied with all the requirements of the statute in regard thereto, has acquired a positive legal right to have it so carried; and his right will be enforced by the writ of mandamus if the Postmaster General *arbitrarily or without valid legal reason* refuses to receive or transmit such publication."

And as showing the almost exact identity between that and the present case, the following language used by the court, on pages 793 and 794, is pertinent, namely:

> "It is conceded that the relator has complied with all the requirements of the *statute*, and that the characteristics of the publication are literally and specifically as therein prescribed; and it appears that the exclusion of the periodical from the mails as second-class matter is based exclusively, and in express terms, upon its failure to comply with the superadded requirement of the *Postal Regulation* that it must consist of 'current news.' Under the doctrine of * * * Roberts *v.* United States, 176 U. S., 221; American School of Magnetic Healing *v.* McAnnulty, decided by the Supreme Court of the United States November 17, 1902; U. S. *v.* Hitchcock, 19 D. C. Appeals, 233, and other cases, we must hold that the ground of exclusion is insufficient in law, and that the relator is entitled to the writ of mandamus for the enforcement of its rights in the premises."
> (Stars represent cases omitted."

The case of American School of Magnetic Healing *v.* McAnnulty, recently decided by this court, is relied upon by the Court of Appeals as justifying and controlling its decision in that case, and properly so; for, although that was injunction and not mandamus, the scope of the two proceedings against the head of a department is the same; the remedies of injunction and mandamus being correlative and co-extensive—whenever one will lie to *restrain* action, the other will lie to *compel* action.

In the McAnnulty case this court, in speaking of the action of the Postmaster-General in determining what should be admitted as second-class mail matter, says:

> "His determination that those admitted facts do authorize his action is a clear *mistake of law* as applied to the admitted facts, and the courts, therefore, must have power in a proper proceeding to grant relief. Otherwise, the individual is left to the absolutely uncontrolled arbitrary action of a public and administrative officer, whose action is unauthorized by any law and is in violation of the rights of the individual."

The present case is almost identical with the Payne case in all material respects, as the petition for mandamus alleges and, by not denying, the answer of the Secretary admits, that Clarke had fully complied with the terms of the statute by which the Government became bound to issue to him a patent for the selected land, namely, that he had conveyed to the Government perfect title to his land within the limits of a forest reserve and in lieu thereof had selected the land in controversy and that such land when selected was such as the statute offered, namely, "vacant land open to settlement." It is specifically alleged, and not denied, that the selected land when selected was open on the books of the local land office, returned as non-mineral in character, and that no mineral had ever been

discovered thereon, and that the same was actually unoccupied. The only ground given for cancelling the selections and denying the patent, is that the selector did not at the time of selection make affidavit as to the admitted fact that the selected land was then unoccupied. The analogy between the Payne case and the present case is most striking, and since the District Court of Appeals held with us that the requirement by the Secretary of such non-occupancy affidavit was unlawful, and as the absence of this affidavit is the sole ground relied upon by the Secretary for cancelling Clarke's selections, it must be apparent that the Court of Appeals plainly erred in not reversing the court below and ordering patent to issue.

Equitable title vests at the date of selection, under the act of June 4, 1897, whether the selector's relinquishment of his forest reserve land be contemporaneous with his selection—as the act of Congress contemplates—or prior thereto, as made necessary by land office regulations.

We claim that the act of June 4, 1897, is an offer of *contemporaneous* exchange of properties, in which the selector should not be required to relinquish his forest reserve land in advance of his selection of the lieu lands offered him by the Government; and we insist that the selector is entitled to know at the very time of making his relinquishment what specific lands he is to get in exchange for his relinquished lands; and we hold that this offer of exchange contemplated not that owners of forest reserve land should trade "sight unseen," or by "a pig in a poke," or get a floating right to select *some* vacant land open to settlement *somewhere*, but that they might be, and would be influenced, guided, and even controlled in making their relinquishments by a knowledge of, and the certainty of obtaining the specific lands they were to get in lieu thereof. As said by the Circuit Court for the Ninth Circuit in Olive Land and Development Co. *v.* Olmstead, 103 Fed., 568:

> "In all cases the land authorized to be selected in lieu of that relinquished is required to be vacant and open to settlement. When? Manifestly at the date of selection. *It is upon its then character and condition that the selector has the right and is bound to act. Before making his selection he must inform himself of the character and condition of the tracts desired;* but it would be wholly unreasonable to say that he is required to make a selection based upon what may be disclosed in that regard in the future."

This clearly shows that the relinquishments and selections contemplated are contemporaneous; but, say our adversaries—both upon the oral argument and in the briefs—this view, and the conclusions drawn from it, must fail, for the reason that, in the practical administration of this act by the land department, the relinquishments to the Government are in advance of the selections, and hence, not being contemporaneous, the equitable title does not vest at the date of selection, as we claim.

This argument is not sound. The rights of a purchaser, while they may not be any better by the payment of the purchase price in advance, are certainly no worse than by his contemporaneous payment. We do not claim that the equitable title vests at the date of the relinquishment, if the relinquishment precedes the selection, but that both relinquishment and selection are required to constitute compliance with the statutory offer of exchange, and until both acts are completed the exchange is not completed, and it is only then that the equitable title vests.

When both acts called for by the statute are consummated, however, certainly the completion of the exchange is not deferred, nor the vesting of the equitable title postponed, because the selector, by his prior relinquishment, has been compelled to pay the purchase or exchange price in advance. In the merchantile world, generally, advance payment of purchase price, instead of being a detriment to

the purchaser, is accounted an advantage which usually entitles him to a discount in price; and, while we are not contending for any such advantage by prepayment here, certainly a selector's rights are not thereby prejudiced.

THE DEPARTMENTAL REGULATIONS ALONE RESPONSIBLE FOR RELINQUISHMENTS IN ADVANCE OF SELECTIONS.

By rule 16 of the regulations of the land department under the act of June 4, 1897, it is provided, as follows:

> "16. Where final certificate or patent has issued it will be necessary for the entryman or owner thereunder to execute a quit claim deed to the United States, have the same recorded on the county records, and furnish an abstract of title duly authenticated showing chain of title from the Government back again to the United States. The abstract of title should accompany the application for change of entry, which must be filed as required by paragraph 15, without the affidavit therein called for."

See 24 L. D., page 592, 593.

It will thus be seen that the department requires one having the perfect title to lands in a forest reserve, to divest himself of such title by a relinquishment placed of record in the county recorder's office, before he is permitted to make his selection in lieu thereof. The placing of the selector's deed of record vests the legal title to the relinquished land in the United States beyond the selector's power of recall; and it is only by an act of Congress that such title can be re-obtained.

Under this regulation of the department a selector is required to part absolutely with the entire consideration for the selected land—that is to pay in advance the full purchase or exchange price—before he can be allowed to make the selection authorized by the statute.

The department has thus closed the door to the contemporaneous exchange of properties contemplated by the statute, and made it absolutely necessary that the owner of forest reserve lands should relinquish such lands to the Government before making his selection of lieu land.

Under the Department's administration of this act, a selector may pick out a particular piece of land which he wishes to select, and may with all haste, send his deed of his relinquished land for record in the proper county, and order his abstract of title brought down showing that he has conveyed a good title to the Government, and yet before he can get back such deed, and abstract of title, and deliver the same to the local land office, and select the tract which he had chosen in his own mind in lieu thereof, such tract may have been selected by some one else, and the real inducement to the transfer may be thus lost, without any fault of the selector.

Because the department by this arbitrary rule has defeated *pro tanto* the efficiency of the act, and rendered contemporaneous relinquishments and selections impossible, certainly a selector's rights—after he has made a selection of land—should not be prejudiced or postponed because of this departmental exaction. Recognizing the hardships of this rule, the department for a long time and until March 6, 1900 (see instructions 29 L. D., 578), permitted owners of forest reserve lands to convey such lands to the Government in large tracts, and to place the deed therefore of record and furnish an abstract of title therefor, and deliver the same to some local land office and thereafter to select, from time to time, lands in lieu of designated portions thereof, each selection referring to the deed of relinquishment and abstract of title theretofore furnished to the Government. By this means, although the owner of forest reserve lands was required to relinquish his lands in advance of his right of selection of lieu lands, yet he was

thereby enabled to hunt up lands he wished to select as lieu lands, and after finding the same, he could select at once, without losing time in sending his deed of relinquishment for record and getting an abstract of title, and running the risk of losing the desired land by having some one take it in the meantime.

This exaction of the land department compelling relinquishments to precede selections, contrary to the requirements of the statute, certainly cannot be urged as a ground of postponing the taking effect of selections, when once made, or as a reason why the selector's title should be exposed to attacks by third persons, or endangered by subsequent mineral discoveries.

The rule of the department requiring all relinquishments to be placed of record in the office of the county recorder of the county in which the relinquished land is located estops the land department from claiming that there has been no delivery of the deed until the department's approval thereof.

Placing the deed of record as directed by the above quoted departmental regulation, operates to vest the legal title of record in the United States; whether the selector ever makes selection of lieu lands or not, and only an act of Congress can revest such title in the grantor, and it certainly does not lie in the mouth of the department to say that there has been no delivery of a deed—the legal effect of recording which has transfered the record title to the United States—such recording having been done under a mandatory departmental regulation.

It was said by Mr. Chapman in the oral argument, that as there is power in the department to *accept* deeds of relinquishment to the United States, the department must have power to *reconvey* such title, if need be. The department, however, in the case of Tevis, 29 L. D., 275-77, held otherwise in the following language:

> "There is no statute under which title so relinquished or reconveyed to the Government can be returned or restored to the party making the relinquishment or reconveyance; that is to say, such a contingency or situation is wholly unprovided for in the existing legislation."

And yet the department exacts relinquishments of record in advance of selections, thus exposing a selector to the possible loss of the only tract of land for which he would have willingly traded his forest reserve land.

COUNSEL'S CONCESSION THAT AFTER THE EQUITABLE TITLE HAS VESTED, NO SUBSEQUENT DISCOVERY OF MINERAL CAN IMPAIR OR AFFECT SUCH TITLE.

It will be remembered that Judge Chapman, upon oral argument of this case, and upon the argument of the equity cases, numbers 217 and 218, distinctly stated that he did not claim that a subsequent discovery of mineral could in any wise impair or affect an equitable title once vested.

The decisions are so overwhelming to this effect that we have never understood how opposing counsel in these cases could have claimed otherwise, and yet we have always considered that they did claim otherwise until this concession was made upon the oral argument of this case. We consider this concession fatal to the claims of our adversaries, as it necessarily rests their whole contention upon the soundness of their other position, announced upon the oral argument and prominently set forth in both their mandamus and equity brief, namely:

The claim that equitable title to public land never vests until there has been an adjudication or determination by the land department that it has vested.

On page 43 of our adversaries' brief in this case it is stated:

> "The authorities are numerous and uniform that under every kind of law for the disposition of the public lands, no title, legal or equitable, vests until the application is passed upon by this special tribunal [the land department] and it has been determined that the party making the application possesses the qualications and has done the things which the law requires of him, and has paid the purchase price."

Other statements to the same effect will be found on pages 47, 48 and elsewhere throughout the brief.

In the brief of our opponents in the equity cases numbers 217 and 218, at the bottom of page 77 and the top of page 78, after reviewing the numerous decisions holding that the land department has jurisdiction until patent issues, to determine as to whether or not the law has been complied with, and as to whether or not title to a certain piece of land should issue a resume of all the points decided by such cases is given, and it is said, that such cases hold

> "*That an equitable title does not pass ever until there has been a decision of that special tribunal upon these questions, and it has been determined that the applicant possesses the qualifications of a purchaser, that he has complied with the terms of the statute and that the lands which he seeks to purchase are of the class that he is entitled to purchase*"

And again on page 104 of the same brief, after quoting some of our strongest cases holding that only mineral "*known at the time of the sale*" can be taken into consideration in determining the character of land, Mr. Chapman concludes with the following startling *non-sequitur*, viz.:

> "*And from the cases already cited and many others, it follows that it is not until there is this judgment of the land department that the lands are of the character sought to be purchased or selected that any title passes.*"

We submit that these conclusions of counsel in no wise follow from the authorities from which they are drawn, and that they are absolutely and fundamentally unsound, as they make the vesting of equitable title depend not upon *paying the purchase price, or other full compliance with the law upon the part of the applicant*, but upon some action of the officers of the land department, such as the issuance of a certificate, or a receipt, or some other paper intended only as *evidence* that the equitable title has passed; whereas the decisions of this court and the land department are innumerably holding that *it is payment of the purchase price or other full compliance with the law upon the part of the applicant that vests the equitable title*, and we challenge counsel to furnish a single case holding that it is the finding or judgment of the land department, or the issuance of a certificate or receipt or any other paper by the land department—as distinguished from paying the purchase price or other compliance with the law—that vests such title; and while it is customary that some such certificate or receipt of the land department issue where the party has paid the full purchase price or otherwise fully comply with the law, yet the issuance of such a certificate or receipt does not *pass* the equitable title. It is only a convenient *evidence* that such title has passed. It is the *act of the party* in full compliance with the act of Congress, and not the *act of the land officers* that *passes* the equitable title.

The decisions are all to this effect. The true doctrine is correctly stated by this court in the case of Benson M. & S. Co. *v.* Alta. M. & S. Co., 145, 128:

> "It is a general rule in respect to the sale of real property that when a purchaser has paid the full purchase price his equitable rights are complete, and there is nothing left in the vendor but the naked legal title, which he holds in trust for the purchaser; and this general rule of real estate law has been

> repeatedly applied by this court to the administration of the affairs of the land department of the government, *and the rule has been uniform that whenever in cash sales the price has been paid, or in other cases all the conditions of entry performed, the full equitable title* HAS PASSED, and only the naked legal title remains in the government in trust for the other party in whom is vested all the rights and obligations of ownership."

To the same effect see:

Simons *v.* Wagner, 101 U. S., 261;
United States *v.* Hughes, 11 Howard, 568;
Stark *v.* Starrs, 6 Wallace, 414;
Worth *v.* Branson, 98 U. S., 118;
Carroll *v.* Safford, 3 Howard, 414;
Witherspoon *v.* Duncan, 4 Wallace, 210;
Deffeback *v.* Hawke, 115 U. S., 392;
Colorado Coal & Iron Co. *v.* U. S., 123, U. S., 307;
Davis *v.* Wiebold, 139 U. S., 524.

As applicable to this particular statute, the fact that the equitable rights of a selector depend entirely upon his compliance with the law, and not upon any action of the land department, could not be more clearly stated than is done in the case of McDonald, 30 L. D., 124, where it is said:

> "By his deed of relinquishment and reconveyance to the United States of his own lands, situated within the boundaries of a forest reservation, and by his selection of the lieu land McDonald accepted the standing offer or proposal of the government contained in the act of June 4, 1897, and complied with its conditions, *thereby converting the mere offer or proposal of the government into a contract fully executed upon his part*, and in the execution of which by the government he had a vested right. After McDonald had fully complied with the terms on

> which the government by its act had declared its willingness to be bound no act of either the executive or legislative branch of the government could divest him of the right thereby acquired."

The case of Clark *v.* Northern Pacific R. R., 30 L. D., 145, is to the same effect. There the Secretary of the Interior says :

> "If the land selected by Clarke was subject to selection at the time he made selection thereof, and if, as appears to have been the case, the lands embraced in his deeds of relinquishment and deed of conveyance were proper bases for his selection, *he acquired at the time of filing such selections and deed of relinquishment and reconveyance, vested rights in the execution by the government of its part of the contract for the exchange of lands.*"

We have not been able to find a single decision, either of the department or of the courts, sustaining counsel's view that the equitable title does not vest until the department has decided that it has vested.

In Hussman *v.* Durham, 165 U. S., 144, 148, it is clearly pointed out that the equitable title to public land passes not by virtue of any certificate or receipt issued by the land department, but by virtue of the applicant paying the purchase price thereof.

The case holds that land is subject to State taxation whenever the complete equitable title has passed from the United States, but holds that the location of a forged bounty land warrant (although the equivalent of a final receipt) passed no title, but that the equitable title passed by the later payment of the purchase price authorized by act of Congress.

The court says :

> "In other words, the United States does not part with its rights *until it has actually received payment*, and if by mistake, inadvertence, or fraud, a certificate of location (which is the equivalent of a receipt) is issued, *when in fact no consideration has been received, no equitable title is passed thereby;* and a conveyance of a legal title does not operate by relation back of the time *when the actual consideration was paid.*"

In Carter *v.* Ruddy, 164 U. S., 495, it was held that the certificate of the officers of the land department was only "evidence" of an equitable title ; making it clear that the certificate itself does not *pass* the equitable title, but is only a convenient evidence thereof.

In this very case, the Secretary of the Interior, acting through the learned Assistant Attorney General for the Interior Department who signs the brief for the defendant in error here, held to the contrary in the following language:

> "That where a person making selections under the act of June 4, 1897, has complied with all the terms and conditions necessary to entitle him to a patent to the selected land, he acquires a vested interest therein, and is to be regarded as the equitable owner thereof."

And yet so great is the desire of the Honorable Secretary to sustain that portion of his opinion which holds the making of a non-occupancy affidavit a condition precedent to the vesting of the equitable title, that the chief law officer of his department is now willing to sign a brief which holds that equitable title does not vest by the act of the party which constitutes full compliance with the law, but solely by virtue of some act of the department. The same lack of candor, or at least inconsistency, is again shown by the frequent citation in the brief of the case of Spratt *v.* Edwards, 15 L. D., 290, 292, whereas the learned Assistant Attorney-

General for the Interior Department sitting for the Secretary of the Interior in the argument of the present cases before that department, said:

> "That is not a decision which I care to follow at all, and we do not follow it. I have not any respect for that decision. It was written by a gentleman who does not know anything on earth about mineral land, whatever he may know about anything else."

But even if some action of the land department be required, such as the issuance of a receipt or a certificate, as evidence that equitable title has vested, this does not help the defendant in error here, as the Register and Receiver of the local land office, allowed and regularly entered these selections on the books and plats of the local land office, and the Register gave his certificate that the land selected "is free from conflict, and there is no adverse filing, entry or claim thereto."

In homestead and preemption cases, the final receipt which has always been taken as evidence that the equitable title had vested, is issued by the local land officers, and not by the Secretary of the Interior or the Commissioner of the General Land Office; and actions of ejectment in most of the States of the Union will lie based upon this final receipt of the Receiver of the local land office in homestead and preemption cases, and yet an even more formal certificate from the Register in these cases is ignored by the Secretary as though it did not exist.

THE HARRELL & CULVER CASES.

In the case of A. J. Harrell, 29 L. D., 553, referred to by our opponents as holding that a selector's rights under the act of June 4, 1897, are fixed at the time of the approval of his selection by the Commissioner, is not a holding that the selector's rights *were not fixed prior to the*

Commissioner's approval. The department was not called upon in that case to pass upon the character of rights acquired prior to the Commissioner's approval, for the reason that such approval had already been had in that case prior to the happening of the occurrence which it was claimed adversely affected the selector's rights; and it was sufficient to say in that case that the selector's rights could not be affected by anything occurring after the approval of the selection. When the department was called upon later to determine the character of a selector's rights acquired before the Commissioner's approval, it held, in the McDonald and Clarke cases above cited, that the selector's rights became fixed and vested, and the contract of exchange wholly executed by him, whenever he had made his relinquishment and selection as required by the statute.

The case of United States *v.* Culver, 52 Fed., 81, is principally relied upon by defendants as supporting their view that the *belief* of a non-mineral claimant as to the mineral character of land affects the right of such claimant to make entry of the land.

We call the court's attention to the fact that in such case it is expressly stated that the land, as to which the patent was set aside, *was known to be mineral at the time the original homestead entry was made.* Counsel's argument in relation to this case seems to be based upon the statement also contained in this decision, that mining experts had expressed the opinion that the land was mineral. This, however, does not weaken the further statement that the land was *known* to be mineral. If the court intended to go as far as our adversaries claim it did, then the case is badly decided, and is squarely in conflict with the express views of this court in I. S. M. Company *v.* Reynolds, 124 U. S., 374; Sullivan *v.* I. S. M. Co., 143 Id., 431; Colorado Coal Co. *v.* U. S., 123 U. S., 307; Deffebach *v.* Hawke, 115 U. S., 399; Davis *v.* Wiebold, 139 U. S., 507; of

Judge Ross, in the Olive L. & D. Co., case, 103 Fed., 578.

If the court in the Culver case was influenced in its decision by the fact that it was apparent that the homesteader acquired the land, not for homestead purposes but for its mineral value, its judgment might be reconciled with the homestead statute, section 2390, which requires the homesteader to make affidavit that "his entry is made for the purpose of actual settlement and cultivation."

The purpose or motive of the homesteader in making homestead entry being thus made by statute an element in his right of entry, it was not improper for the court to take such purpose into consideration in the Culver case; but we have shown that the purpose of a selector under the act of June 4, 1897, in making his selection is not an element in his right of selection and is wholly immaterial. See pages 25 and 27 appellant's opening brief in equity cases, 217 and 218 argued herewith, and Olive L. & D. Co. *v.* Olmstead, 103 Federal, 568.

ADDITIONAL REASONS GIVEN BY THE ANSWER FOR HOLDING CLARKE'S NON-MINERAL AFFIDAVIT INSUFFICIENT.

The answer gives only one other reason for rejecting Clarke's selections and denying him patents, which heretofore we have considered too trivial to notice; but since it was referred to upon the argument as of some consequence, we will briefly consider it; this reason is found in paragraph 3 (Record 123, 124), and is that Clarke struck out of the non-mineral affidavit filed by him the following language:

> "That no portion of said land is claimed for mining purposes under the local customs of rules of miners, or otherwise."

We submit that if land is not *known to contain mineral*, that is, if no mineral has ever been *discovered* thereon, which

the affidavit without the stricken out clause expressly negatives, it is wholly immaterial that some one may be claiming the land for mining purposes "under the local laws and customs of miners or otherwise," for such a claim would be utterly void and of no effect, as the statute expressly provides that there shall be no location of a mining claim until after the discovery of mineral within the boundaries thereof. See section 2320, Revised Statutes. So altogether outside of the necessity for filing any non-mineral affidavit as a condition precedent to the vesting of an equitable title in the selector under this act, the striking out of this particular language from the affidavit was wholly unimportant even had there been a local mining district, and consequently local rules and regulations under which miners could claim ; but as there was no such mining district and no local rules, regulations, or customs of miners, and none are even claimed by the answer, and in view of the fact that the language left in the affidavit expressly negatives the possibility of there being a *valid* mining claim on such land—as it negatives all *discovery* of mineral—without which there can *in law* be no mining claim, no matter what any local rule or custom of miners may provide—it shows the extent to which the Secretary is driven for him to urge, as is done in paragraph 3 of his answer (Record) that—

> "If any portion of said land was claimed for mining purposes under the local customs and rules of miners or otherwise, which said local customs and rules of miners are by act of Congress made a part of the mining laws of the United States, then the said lands were not vacant lands open to settlement within the intent and meaning of said act of June 4, 1897."

The Secretary must be presumed to know the well-established law, namely, that there is no power in a local mining

district to dispense with the necessity of an actual *discovery of mineral* within the boundaries of a mining claim as a condition precedent to the making of a valid mining location or the existence of a valid mining claim. Such a discovery is a statutory prerequisite and when it is negatived, as is done in this affidavit, it is wholly immaterial that the land might be claimed under some local mining rule or custom, or otherwise; as the United States mining laws only recognize local mining rules and customs when not in conflict with the provisions of the revised statutes. See section 2324, which provides:

> "The miners of each mining district may make regulations not in conflict with the laws of the United States or the State or Territory in which the district is situated, etc."

This provision, of course, is subject to the provision of section 2320 R. S., above referred to, that no location of a mining claim shall be made until the discovery of mineral within the same.

Another objection urged to the affidavits made in connection with Clarke's selections is (see paragraph 3 of answer, Record,), that there is inserted therein the following clause, which is alleged to impair or vitiate the other statements contained in the affidavit, namely:

> "This affidavit is made upon the evidence found upon the surface of the ground. Deponent does not undertake to express any opinion as to what may be under the ground.

It is perfectly evident here that the deponent wished to make it clear that he was speaking wholly from what he could see, from what was *known*, from what was *discovered*, and not from any theory or conjecture or belief as to what future underground developments might discover or develop or disclose. Such is the true rule, and the one which

the law would have adopted and applied to the affidavit, even had this clause not been inserted.

See Dughi *v.* Harkins, 2 L. D., 721, and Davis *v.* Wiebold, 139 U. S., 507.

That where land is returned and entered as agricultural in character, it is the ***known*** condition thereof at the time the purchaser's rights become vested that must control, and not the actual but ***undiscovered*** character thereof; this is throughly established by the leading case of Colorado Coal and Iron Company *v.* United States, 123 U. S., 307.

The last objection urged to the affidavit is that at the end of the clause saying that the selection is made with a view to selecting land for agricultural purposes is added the words "so far as deponent knows." This is even a more trivial and more unsubstantial objection than any of the others urged, for the reason, first, that the affidavits were made by one A. Barion, and not by Clarke himself, as is permitted by the only regulation of the department ever promulgated under the forest reserve act which seems to assume that a non-mineral affidavit is contemplated under such act. We refer to the instructions of March 6, 1900, (made several months after these selections were made), 29 L. D., 580, 581, which says that:

> "The non-mineral affidavit may be made by any credible person possessed of the requisite personal knowledge in the premises."

This instruction seems to take it for granted that such an affidavit is required under the forest lieu land act, and as it permits such an affidavit to be made by any one other than the selector possessed of the "requisite knowledge," and as this particular allegation referring to the "***purposes***" of the selector deals with a condition of the ***mind*** of the selector, any statement as to which ***mental condition*** when made by

another party must necessarily be qualified by the statement that the same is true "so far as deponent knows."

The second and principle reason why this qualifying statement is unimportant is that the statement which it qualifies—namely, that the land is sought for "*agricultural purposes*"—is entirely immaterial, as the right of selection under the statute in question in no wise depends upon the "purpose" of the selector or the use which he intends to make of the selected lands. *The statute has exacted no such condition and the department cannot*; and in view of the fact that upon the argument of these cases before the Assistant Attorney-General for the Interior Department, sitting for the Secretary of the Interior, he distinctly announced that this clause in the affidavit was of no consequence, as the statute did not make the selector's purpose an element in his right of selection, the *bona fides* of this objection may well be doubted. It at least suggests a lack of candor in the return.

NO NECESSITY FOR ANY NON-MINERAL AFFIDAVIT.

While it must be perfectly clear that the non-mineral affidavits which were made in this case show affirmatively that no mineral had been discovered on the land up to that time, and that this is all that under any reasonable view of the matter could possibly be required of the selector in order to establish the non-mineral charter of the land, yet we submit that the making of *any* non-mineral affidavit cannot be lawfully exacted of the selector by the land department under the act of June 4, 1897, *as a condition precedent to the making of a valid selection, or as a condition precedent to the vesting of the equitable title in the selector.*

Such an affidavit is not evidence having any binding force upon the Government or third persons; and where the land is returned as non-mineral such affidavit adds nothing to

the legal presumption that the land is non-mineral in character, and is therefore only cumulative; and it cannot be claimed that it is necessary as evidence of the selector's good faith, for his payment of the full purchase price of the selected land in advance, is sufficient evidence of his good faith in the transaction.

In this connection we call the court's attention to the discussion of the legal necessity of a non-mineral affidavit in connection with selections under the act in question, contained on pages 150 to 155 of appellant's brief in equity cases numbers 217 and 218 argued herewith, and to the recent letter of the Secretary of the Interior to the Chairman of the House Committee on Public Lands (record herein, pages 131, 132) asking for legislation authorizing the requiring of such non-mineral affidavits, and showing that two Federal courts have recently held that such requirement under the existing law is unlawful.

As pertinent to the Secretary's holding that by departmental regulation the Interior Department has, in its construction of the statute, lawfully exacted an affidavit not required by Congress, the following language of this court in Interstate Commerce Commission *v.* Cincinnati, etc., R. R. Co., 167 U. S., 479, 510, is in point:

> "Still again it is urged that the Commission has decided that it possesses this power, and has acted upon such decision, and an appeal is made to the rule of contemporaneous construction. *But it would be strange if an administrative body could by any mere process of construction create for itself a power which Congress had not given to it.*"

A MINERAL CLAIMANT MAY MAKE RECORD ENTRY IN THE LOCAL LAND OFFICE AS SOON AS HE HAS MADE A VALID MINING LOCATION.

While it is not at all essential to our case, and no issue is made upon it, it is proper to state that under the mining

laws a mining claimant is permitted to enter his claim of record, by making application for patent, immediately on discovery of valuable mineral deposits, and marking the boundaries of his claim. There is no other condition precedent to the contrary. There is no decision in the courts or in the land department to the contrary. All mineral statutes permit it.

Within sixty days after making application for patent, or before if he choses, the mineral claimant must do five hundred dollars' worth of work on his claim. The right, immediately upon discovery, to make record entry in the land office—that is to make his application for patent—affords a mineral claimant, after making a valid mining location, the same record protection as an agricultural claimant is given, and if he neglects this, he has no one to blame but himself.

This court has distinctly held, in Northern Pacific *v.* Colburn, 164 U. S., 383-386, and in Tarpey *v.* Madsen, 178 U. S., 215-221, and in a number of other cases, that the license or permission to occupy land given by statute to an intending homesteader for three months after settlement before making record entry is not a right *which attaches to the land*, as against a grantee of the United States. And if it is a proper construction of the agricultural laws to say that an intending homesteader occupying land without record entry under a statute guaranteeing him the license so to do, postpones his record entry at his own peril, and at the risk of the land being taken by a grantee of the Government at any time before his record entry is made, we submit that by parity of reasoning it may be held that the mineral claimant, under his license to explore and locate mineral lands, postpones his record entry—his application for mineral patent—at his peril, and that no right attaches in his favor as against the Government or its grantee, until such entry is made of

record ; for the license under which he operates is no more sacred or inviolable than that under which the homesteader acts. Each is a formal statute of the United States clearly according the privilege claimed, and if a right to the land does not attach in the one case as against the Government, or its grantee, there is no reason to hold that it does in the other. The law does not encourage a claimant of public lands under any statute to depend upon parol evidence of title, when the law affords him a perfectly clear means of acquiring record evidence thereof. The very life principle of real estate title is written evidence thereof ; but as already stated we are not in this case compelled to contend for any such position, and only make this suggestion that the court may see the analogy between the situation of a mineral claimant before record entry and that of an intending homesteader before record entry, each claiming under a statute purporting to give a license to occupy lands prior to record entry.

CONCLUSION.

The petition for mandamus alleges, and the answer admits, that the land selected by Clarke was *in fact unoccupied* when selected, and that Clarke had fully complied with all the *statutory* conditions entitling him to a patent, and hence the duty of the Secretary of the Interior to issue such patent became and was—under the decisions of this court—purely ministerial ; and the same was withheld solely on the ground and for the reason that Clarke did not comply with the superimposed requirements of an alleged departmental regulation—*a condition not prescribed by the statute*—which regulation in fact never existed ; and which would have been void had it existed ; and compliance with which was waived by the established departmental practice even though valid. It follows that the cancellation of Clarke's

selection, and the refusal to grant him patent, was "arbitrary and without just legal cause," and that mandamus should issue to compel proper action.

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FILE COPY.

In the Supreme Court of the United States.

OCTOBER TERM, 1902.

Office Supreme Court U. S.
FILED
MAR 17 1903
JAMES H. McKENNEY,
Clerk.

THE UNITED STATES OF AMERICA ON THE relation of The Riverside Oil Company, a corporation, plaintiff in error,
v.
ETHAN A. HITCHCOCK, SECRETARY OF THE Interior.

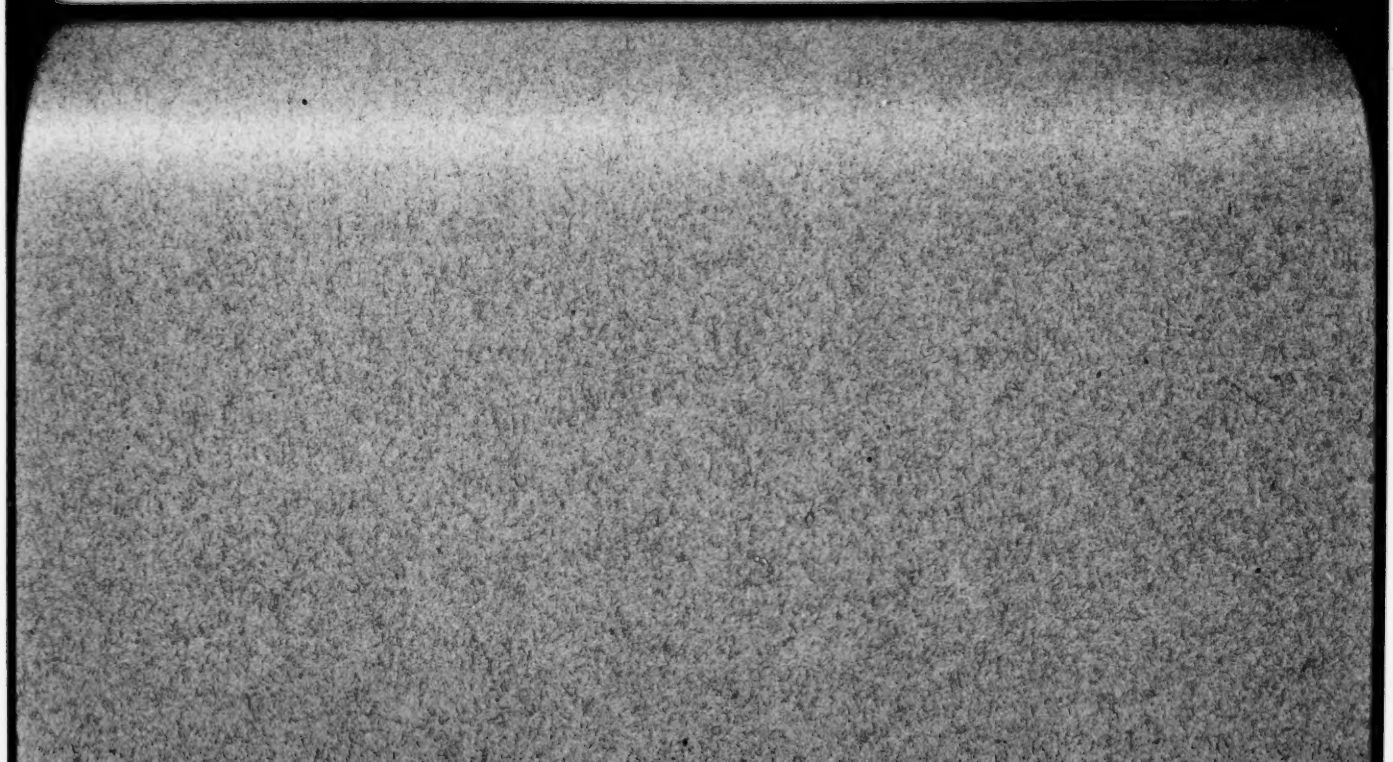
No. 632.

APPEAL FROM THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA.

BRIEF FOR THE DEFENDANT IN ERROR.

MORGAN H. BEACH,
United States Attorney for the District of Columbia.
HENRY H. GLASSIE,
Assistant United States Attorney.

HENRY M. HOYT,
Solicitor-General,
JOHN S. CHAPMAN,
Special Assistant to the Attorney-General,
Of Counsel.



In the Supreme Court of the United States.

OCTOBER TERM, 1902.

THE UNITED STATES OF AMERICA ON THE relation of The Riverside Oil Company, a corporation, appellant,
v.
ETHAN A. HITCHCOCK, SECRETARY OF THE Interior, respondent.
} No. 632.

APPEAL FROM THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA.

STATEMENT OF THE CASE.

This proceeding was instituted by a petition filed in the supreme court of the District of Columbia on April 16, 1902, for a writ of mandamus, directed to the defendant, to command him as Secretary of the Interior "to recall and vacate an order which had been made by the Department of the Interior, rejecting certain selections of certain public lands made by one Clarke, and if such selections had already been canceled, to vacate and recall such cancellation and reinstate the proceedings relating to the said selections, and thereupon to proceed therein as required by law, and to

order certain selections passed to patent, and cause to be prepared and presented for signature to and by the proper officer of the United States of America a patent or patents for the said selected lands, and that the petitioner might have such other or further relief," and so forth (Rec., pp. 19 and 20).

In the supreme court of the District of Columbia the case came to be heard upon a demurrer to the return of the Secretary of the Interior. That court held the grounds set up in the Secretary's return to be a sufficient answer to the petition, and overruled the demurrer. Upon motion for a rehearing, the court, remaining of the same opinion, affirmed the judgment overruling the demurrer. The petitioner thereupon elected to stand upon its demurrer, and final judgment was rendered denying the writ and dismissing the petition. From that judgment the petitioner appealed to the court of appeals. There the judgment of the supreme court of the District was affirmed. It is that judgment of the court of appeals which the plaintiff in error seeks to review in this court.

ALLEGATIONS OF THE PETITION.

The petition sets forth that on the 28th of October, 1898, Clarke, who was a citizen of the United States, was the owner in fee of the southwest quarter of the southwest quarter of section 36, township 37 south, range 5 east, Willamette meridian, in the State of Oregon, containing 40 acres, covered by patent, and that he was also on the 5th of May, 1899, the owner of the east half of the southwest quarter, and the

southwest quarter of the southwest quarter of section 16, township 21 south, of range 7 east, Williamette meridian, in the State of Oregon, one of the tracts containing 40 acres and the other 120 acres, and both covered by patents; that on the 14th of February, 1893, the townships and ranges in which the said lands were situated were, among other lands, by proclamation of the President of the United States, under the forest reservation law, designated as the "Cascade Range Forest Reservation."

That by an act of Congress approved June 4, 1897, it was provided:

> That in cases in which a tract covered by an unperfected *bona fide* claim or by a patent is included within the limits of a public forest reservation, the settler or owner thereof may, if he desires to do so, relinquish the tract to the Government and may select in lieu thereof a tract of vacant land open to settlement not exceeding in area the tract covered by his claim or patent; and no charge shall be made in such cases for making the entry of record or issuing the patent to cover the tract selected: *Provided further*, That in cases of unperfected claims the requirements of the law respecting settlement, residence, improvements, and so forth, are complied with on the new claims, credit being allowed for the time spent on the relinquished claims. (Rec., pp. 5 and 6.)

This is followed by allegations of the petitioner, which are designed to instruct us in the meaning of the words "vacant land open for settlement," as used in this act,

and also as supposed to be established "by long Congressional, judicial, and departmental usage and interpretation," and which, it is said, from these sources of information, mean "any public lands appearing on the records of the Land Department as lands not taken by an individual," or, as decided in the case of F. A. Hyde (28 Land Decisions, 284, 288), "any public land to which rights may be initiated by settlement under existing laws."

And we are told that the act in itself prescribes no other conditions precedent to selection. (Rec., p. 6.)

The amendatory act of June 6, 1900, is then set forth, and it is simply to the effect—

> That all selections of land made in lieu of a tract covered by an unperfected *bona fide* claim, or by a patent, included within a public forest reservation, as provided in the act of June fourth, eighteen hundred and ninety-seven, * * * shall be confined to vacant surveyed nonmineral public lands which are subject to homestead entry, not exceeding in area the tract covered by such claim or patent: *Provided*, That nothing herein contained shall be construed to affect the rights of those who, previous to October first, nineteen hundred, shall have delivered to the United States deeds for lands within forest reservations and make application for specific tracts of lands in lieu thereof. (*Id.*, p. 6.)

This is followed by another discourse, wherein we are informed by the petitioner, by way of averment,

that by this last-mentioned act Congress limited the class of lands open to selection to "vacant surveyed nonmineral public lands which are subject to homestead entry," and specifically confirmed the construction of the language of the original act of June 4, 1897, and recognized that the words "vacant land open to settlement" mean even more than "vacant surveyed nonmineral public lands which are subject to homestead entry;" and petitioner avers that under the law the lands returned either as agricultural or mineral in character are enterable under the homestead law until the actual discovery of valuable mineral deposits thereon.

It likewise avers that the said act of June 4, 1897, gave the Secretary of the Interior no authority to make regulations in any manner or form respecting the *exchange* of patented lands within the limits of a public forest reserve for vacant land open to settlement, and the said Secretary of the Interior was wholly without authority to make any such regulations or impose any conditions upon a selector, and his authority was and is limited to the exercise of his function of determining the sufficiency of the deeds of relinquishment to the Government, and directing the issuance of patents for the tracts selected; yet, nevertheless, on May 9, 1899 (28 Land Decisions, 521, 523), he wrongfully assumed the authority to approve and promulgate certain instructions addressed to the various local land officers, prescribing as requirements and conditions precedent

to the relinquishment of forest-reserve land the following:

> In all cases relinquishments made in pursuance of said act must be executed, acknowledged, and recorded in the same manner as conveyances of real property are required to be executed, acknowledged, and recorded by the laws of the State or Territory in which the land is situated. Where the legal title to the land has passed out of the United States there must also be filed with the relinquishment a duly certified abstract of title showing that at the time the relinquishment was filed for record the legal title was in the party making the relinquishment and that the land was free from liability for taxes and from other incumbrance.

And he also approved a certain form of selection in lieu of the land relinquished, which form contained the recital of the contemporaneous submission, among other things, of an affidavit "showing the lands selected to be non-mineral in character and unoccupied;" and the petition thereupon sets forth a copy of that form, in which the applicant does state that he submits with it an affidavit showing the land selected to be non-mineral in character and unoccupied, and he therefore asks that a United States patent issue to him for the tracts thus selected. (Rec., pp. 6 and 7.)

We are then told that Clarke did execute a deed relinquishing certain lands to the United States, which is set forth in favorite terms with our adversaries, as being done "in the desire on his part to accept the offer of exchange made;" that the offer of the United States

made by the act of June 4, 1897, might be taken advantage of by him; and that at the same time at which he made this relinquishment by deed to the United States of the two tracts of land of which he claimed to be the owner within the forest reserve, he caused them to be recorded in the respective counties in which the lands were situated.

We are next referred to the act of March 3, 1883, wherein the registers and receivers of local land offices were required upon application to furnish official information as to what lands appear upon their books as vacant and what as taken; and that Clarke applied to the register and receiver of the Visalia land office on the 14th of December, 1899, for information in regard to vacant lands open to settlement in that district, and was officially informed by said local land officers that the following-described tracts of land, situate in the Visalia land district, were vacant lands, open to settlement, as shown by the tract books and records of said land office, viz: The north half of the southeast quarter of section 4, township 29 south, of range 28 east, Mount Diablo base and meridian, and the south half of the northeast quarter of said section 4, said township and range, and thereupon, on the said 14th day of December, 1899, the said Clarke delivered and surrendered to the said register and receiver of the said United States land office at Visalia, Cal., the said two deeds of conveyance and relinquishment, with abstracts of title showing good titles to said lands in him, the said Clarke, free from incumbrance, and then and

there, in lieu of said patented forest-reserve land, designated and selected the said north half of the southeast quarter and south half of northeast quarter of said section 4, equal in area to said relinquished lands, and as evidence of such selection filed with the said register written declarations of such selection, one for the north half of the southeast quarter and one for the south half of the northeast quarter of said section 4, and though under no obligation so to do, at the request of the said local land officers, *filed with each of said declarations of selection an affidavit* alleging in effect that said lands were vacant lands open to settlement, true copies of which said deeds of relinquishment, abstracts, declarations of selections, and affidavits are filed herewith, marked respectively Exhibits A, B, C, D, E, F, G, and H.

Then we are told that by the delivery and surrender of said deeds Clarke became divested of the title to the said lands, and the title in fee thereto became vested absolutely in the United States, and the United States can divest itself of the title thus acquired only by act of Congress.

It is then alleged that the two tracts of land selected by Clarke were surveyed by the United States surveyor-general for California, and returned and classified by him as agricultural lands, prior to said selections, and at the time of selection by said C. W. Clarke the two tracts of land were shown on the books and records of the Land Department as and being agricultural land, not reserved or otherwise closed to

settlement, but subject to disposition under the land laws of the United States, and especially under the act of June 4, 1897.

The petition then states that at the time of selection by Clarke there was upon the records of the land office no filing, entry, or claim to said selected lands, and the conclusion of law is then drawn that the same were vacant lands, open to settlement.

And the petitioner, still insisting that the land office records are binding upon the United States and the Land Department thereof, as to the character of the lands, yet further avers that at the time of the said selection by said Clarke there had been no discovery of mineral on said lands, and no mineral was known to exist therein, and the same were in law and in fact agricultural lands, and no valid or legal claim to the same had then or theretofore been initiated; that the United States then were the sole and exclusive possessors and occupiers of the same, as part of the vacant public land open to settlement. (*Id.*, p. 9.)

We are next informed that by the acts of Clarke he effected and perfected a valid and binding exchange of his said patented lands for the lands so selected, exchanging title for title, possession for possession, occupancy for occupancy, and became the owner of said selected lands with general warranty of title from the United States and entitled to patents therefor.

There then follows a citation of the decisions made by the Department, and there is a quotation made from one of them which is supposed by the petitioner

to be in some way or other of great importance to his right, and, after this excerpt from the opinion in the McDonald case, and as also in the case of *Clarke* v. *The Northern Pacific Railway Company*, the petitioner next avers that, by the act of January 27, 1898, it was provided that the register and receiver for each land district "shall have charge of and attend to the sale of public and Indian lands within their respective districts," and, as *conclusions of its own*, that, upon the delivery and surrender of the said deeds of relinquishment and the filing of the said declarations of selections, as aforesaid, and the further examination of the records by the receiver and register, by virtue of the original jurisdiction conferred upon them by the act of January 27, 1898, those officers then and there accepted on behalf of the United States the said deeds of relinquishment, and the said declarations of selections, and appended to each of said declarations a certificate to the effect that the lands selected were free from conflict, and that there was no adverse filing or claim of entry thereto (Rec., p. 10), and that the claim of Clarke was then entered upon the records and tract books of their office as taken by him.

Then we are told that, notwithstanding all this, the Land Department, without authority of law, required Clarke to publish a notice of his said selection for the period of sixty days, and to pay for the same, and that the register of the land office, under dates respectively of January 21 and January 22, 1900, forwarded all the papers to the Commissioner of the General Land Office,

accompanied by letters certifying a second time that the records of his office showed the lands to be free from conflict and subject to such selection, and reporting that publication had been ordered under circular of the General Land Office of December 18, 1899, which was subsequent in date to the selection by Clarke, and true copies of said letters are filed herewith, marked, respectively, "Exhibits I and J."

Then Clarke, though it is said that he was not under legal obligation so to do, did make the required publication of notice; and thereupon, on February 6, 1900, the Kern Oil Company filed in the said local land office a protest against both of said selections, with accompanying affidavits, a true copy of which is filed with the petition and marked "Exhibit K."

On February 12, J. F. Elwood and others filed in said local land office protests against said selections, with accompanying affidavits, true copies of which are filed herewith, marked, respectively, "Exhibits L and M."

All of these were forwarded to the General Land Office.

We are then told that these protests were insufficient in form and substance to constitute an issue as to whether or not said lands selected, as aforesaid, by said Clarke were vacant lands, open to settlement at the time of such selections, and that said protestants, by reason of said nondiscovery of minerals in the said lands, are wholly without standing as adverse claimants, under the law and practice of the Land Depart-

ment, with more concerning the insufficiency of these protests.

Then follow allegations of the transfer by Clarke to Alexander, and by Alexander to the petitioner, and of the rights which passed thereby. (Rec., pp. 11 and 12.)

In the fourteenth paragraph of the petition the protestants, who were claiming the lands under the mining laws of the United States, are assailed as mere pretended explorers for minerals and so forth, and it is said that they had made no discovery, and that the provisions of section 2335 of the Revised Statutes contemplate hearings only when the adverse party shows color of title and right to the land. (*Id.*, p. 12.)

Then follows the averment showing that on December 18, 1900, the Commissioner of the General Land Office consolidated the two selections, considered them as one case, and rendered a decision in the controversy thus made between them, which decision is printed in the transcript herein and will speak for itself as to what it determines. (Rec., pp. 59–71.) But the result of it was that the Commissioner did order a hearing to be had for the purpose of determining the questions in controversy, namely, whether this was mineral land, whether these parties had made a location of it, and were then engaged in the operation of mines thereon, and were in the occupancy thereof. FROM THIS DECISION THE PETITIONER APPEALED TO THE SECRETARY OF THE INTERIOR (see pp. 12, 13); and he, after hearing the parties, set aside the order of the Commissioner directing the hearing, but at the same time rejected the applications of Clarke. A motion

was subsequently made for a rehearing of the matter, and it was then again argued before the Assistant Attorney-General for the Department of the Interior, and the decision again made rejecting these selections, for reasons which are set forth in the opinion.

(For the remainder of the petition see pp. 12 to 20.)

THE EXHIBITS.

There then follow these various exhibits. In the affidavits of nonoccupancy and nonmineral character of the lands submitted by Clarke it will be seen that the affidavits do not conform to the requirements of the regulations. Mr. Barion, who makes the affidavits, says that the tract is agricultural in character, and contains no known deposits of coal or other minerals, and is not subject to entry under the coal or mineral land laws of the United States, but he adds:

> This affidavit is made upon the evidence found on the surface of the ground. *Deponent does not undertake to express any opinion as to what may be under the ground.*

And he also says that no portion of the land was worked for minerals during any part of the year by any person or persons. (Rec., pp. 23, 24.)

The other affidavit is of the same character. (Rec., pp. 24, 25.)

The opinion of the honorable Commissioner shows what changes the affidavit prescribed by the Department underwent in these selections. Thus the words "THAT THERE IS NO OCCUPATION OF SAID LANDS ADVERSE TO THE SELECTION THEREOF UNDER THE ACT OF

JUNE 24, 1897, BY ——," being embraced in brackets (p. 60 of transcript), were ERASED, and the words, "*this affidavit is made upon the evidence found upon the surface of the ground. Deponent does not undertake to express any opinion as to what may be under the ground*," were interlineations or interpolations made by the affidavit maker.

And further along the other words in brackets, "THAT NO PORTION OF SAID LAND IS CLAIMED FOR MINING PURPOSES UNDER THE LOCAL CUSTOMS OR RULES OF MINERS OR OTHERWISE," were erased. (Rec., p. 60.)

Returning now to the facts as they appear. On January 21, 1900, the register of the land office at Visalia transmitted the applications of Clarke to the honorable Commissioner of the General Land Office, together with the affidavit of Barion, and also the deeds from Clarke and wife to the two tracts of land, and with his own certificate that the records of his office showed the land selected to be free from conflict and subject to such selection. He also noted the fact that publication had been ordered under the circular of December 18, 1899. (Rec., pp. 25, 26.)

PROTESTS AGAINST THE SELECTION.

After this publication had been made, the Kern Oil Company appeared before the register and receiver at the Visalia land office and presented their protest against the issuance of a patent to Clarke, and they set forth in that protest that on or about the 11th of June, 1899, J. F. Elwood and others, naming them, citizens of the United States and over the age of 21 years, as

an association of eight persons, located certain placer mining claims under the laws of the United States, which claims were known as the "Fossil," being the northeast quarter of section 4, and "Junebug," being the north half of the southeast quarter of said section, all in township 29 south, range 28 east, M. D. B. and M., and stated in the protest that in making this location the locators definitely marked the boundaries of the said placer mining claims and each of them, so that the lines could be readily traced by anyone, and set corner monuments and intermediate stakes between the corner monuments, so that any person going upon the ground could readily trace the lines, and also posted notices of location on the claims and each of them, which contained a description of the claims, and the names of the locators, and date of location, and which notice was recorded in the office of the county recorder of Kern County. The protestants further stated that at the time of making the said location the locators had made such discovery of minerals as to entitle them to make the location, and that they entered into the possession of the claims, and each of them, and were developing the same, and sunk wells upon them, and each of them, and in sinking said wells they discovered petroleum in paying quantities upon each of said claims; that the well on the "Junebug" was sunk to the depth of 120 feet, and on the "Fossil" 130 feet, and were prospect wells, sunk for the purpose of prospecting the said claims; that immediately adjoining this land, and within 75 feet from the west line thereof,

an oil well was sunk by the owner of the premises upon which the same was bored, and in sinking the said well the oil sands and strata containing the petroleum were found at about the depth of 120 feet; that said oil sands continue to a depth at the present time of 380 feet, and that the product of said well, and the yield thereof, is at least 25 to 30 barrels of potroleum per day; that on the north of the said "Fossil" placer mining claim, and within 50 feet of the north boundary thereof, a well was sunk by the West Shore Oil Company, a corporation, and that the said company found oil sands at a depth of about 100 feet, and that it was a producer of petroleum, and at a depth of 450 feet the oil well would and was calculated to produce petroleum of at least 20 barrels per day; that the strata of oil sands underlying the placer mining claims set forth were flat and horizontal, and what is known to miners as of blanket formation. The Kern Oil Company then alleged that it had succeeded to the rights of the locators and had paid large sums of money for the placer mining claims, which purchase was made for the petroleum therein contained and for no other purpose, and that the lands were of the value of $250 per acre for petroleum, and had no value for anything else; that the lands were not susceptible of irrigation, being above any possible ditch level that might be brought from the Kern River, which was the only means of irrigating or of obtaining water to irrigate said lands; that the lands were precipitous and steep, with deep ravines and gulches running through the same, and if

water could be brought upon the land the same could not be retained even for practical irrigation purposes, and that the lands were sandy, desert lands, with no vegetation growing thereon. It stated that it had been in the possession of the said mining claims, and each of them, namely, the west half of each of them, and is now, and has been for a long time past, the owner thereof; that the protestants had expended considerable money in developing the said claims, and the premises so owned by them, for the petroleum therein contained, and to show the actual worth of the lands as petroleum land, and that the same lies in one of the greatest petroleum belts in the State of California; that the land selected by Clarke in each of his applications embraced lands then owned and possessed by the Kern Oil Company, and that Clarke at the time of making his said application well knew the mineral character of the land, and could have known the same if he had gone upon the premises, and notwithstanding this he selected the same as agricultural lands, and caused one Barion to make an affidavit setting forth certain facts but striking out of said affidavit many material facts required by the Department of the Interior to be made in selecting said lands; that at the time he made this affidavit he stated that no mining operations were being carried on upon the said land, or any part thereof, when, in truth, on the east half of the Fossil placer mining claim and on the south half of the northeast quarter of said section 4, there were derricks, machinery, tools, buildings, and appliances upon the

said placer mining claims of the value of at least $5,000, and all of which he well knew, if he went upon the land, as said machinery and buildings were upon the highest point upon the said land; that Clarke did not and could not have made application for these lands for agricultural purposes except for the purpose of obtaining or endeavoring to obtain said mineral lands in violation of the rights given to settlers under the act of June 4, 1897; that said lands had no value as agricultural lands, and that all of these things were known to Clarke, and that application was made for the purpose of obtaining the mineral location and mining claims owned by this protestant in violation of the laws of the United States prohibiting the selection of mineral lands under the act of June 4, 1897, all of which matters and things Clarke must have known if he went on the premises, and the protestant attached thereto the affidavits of Keith, Hoxie, Knowles, Phelps, Lindsay, and Elwood, showing the character of these lands, and made them a part of the protest. (Rec., pp. 26–29.)

This protest was sworn to by Bender, and a copy of the notice of location was annexed (Rec., pp. 30–32), and a certificate of the recorder attached to the said notice (Rec., p. 31), and then follows the other notice locating the Junebug claim (Rec., pp. 31, 32). Next follows the affidavit of Keith, to which affidavit was attached a plat showing the location of the petroleum wells, which, however, does not appear to be contained in this transcript. In this affidavit he tells of the wells

that were bored all around this land, in all of which oil was found in paying quantities, and that he was well acquainted with the placer mining claims known as the Fossil and the Junebug, and states how these wells which he bored were situated with reference to those mining claims. (Rec., pp. 32, 33.)

Hoxie was one of the locators of both the Junebug and the Fossil placer mining claims, and he showed what was done with reference to marking the boundaries of the location and posting the notices and recording the same, and that at the time of making locations they had made the discovery of mineral and petroleum within the boundary lines of said locations, which discovery was such as to lead them to continue to sink wells upon said locations and each of them; and they sank a well on the Junebug during the month of June and the early part of July, 1899, to a depth of 122 feet, and in sinking said wells found petroleum and penetrated the oil sand and strata containing the bituminous matters and found petroleum of extraordinary richness; that this well was bored and sunk at the expense of said locators, and that the said locators and their successors in interest have been in possession of said placer mining claims and each of them ever since the date of location. (Rec., p. 34.)

Now, it will be noticed that both of Clarke's applications bore date and were presented on the 13th day of December, 1899 (Rec., pp. 21, 22), **and the well that was sunk on this Junebug claim was sunk in June and the early part of July of the same year, five months before any application of Clarke to select these lands.**

Elwood was also one of the locators of both of these claims, the Junebug and the Fossil, and on the Junebug he caused the well to be bored, beginning in the latter part of June, 1899, and completed during the month of July of that year. That in boring said well petroleum in large quantities was found and penetrated at a depth of 122 feet and showed the lands to be valuable as petroleum lands. He also testifies that he and his grantees have been in possession of said mining claims, working and developing them ever since the date of the location, on the 11th of June, 1899. (Rec., pp. 35, 36.)

Lindsay, also one of the locators, attests the same facts. (Rec., pp. 36, 37.)

Phelps, who has been in petroleum mining and examining mines in petroleum for twenty years, said that he had examined the lands within these claims, and shows what was discoverable there on the surface, and that it was of such character as would lead a petroleum miner to make further development of the claim. He was also on the Junebug claim in June, 1899, and found that a well was then being put down, and examined the débris of sand and oil as being taken out of the said well, and that it showed that oil was found in considerable quantities. He was there again on the Fossil placer mining claim in July, 1899, and found persons engaged in the operation of drilling for oil on the said placer mining claim, and that what was there found in the well was of the same character. (Rec., pp. 37 to 39.)

Knowles was the manager of the West Shore Oil Company and knew the Fossil mining claim; that he had sunk a well on the southeast quarter of section 32 that would produce not less than 25 barrels of petroleum a day, and that the shale and sand containing bituminous matters and residuum of petroleum found on the Fossil was of the same character as that found on the southeast quarter of section 32, and that the strata is about 200 feet in thickness, and at a depth of 450 feet continues to grow richer, as further depth is obtained, and that he did not know the full depth of the oil strata at the present time, but, as before stated, that in boring he had penetrated the oil sands for about 200 feet in thickness. He shows that this formation is what is known as the "blanket strata of oil sands." (Rec., pp. 39, 40.)

A protest was filed by Elwood and others (Rec., pp. 30–44), and which was accompanied by affidavits of several different persons. (Rec., pp. 44–47.)

Another protest was filed by the same parties against the application of Clarke to enter the south half of the northeast quarter of section 4, township 29 south, range 28 east, M. D. B. and M., which was also accompanied with affidavits as to the character of the lands, both for agricultural and mineral purposes, and what these mining locators had done with reference to making the location and developing and working the mines therein (Rec., pp. 47–55); and, without further stating the contents of these affidavits and protests, which are all substantially to the same effect, it is sufficient to say that they show that a valid mining location

had been made of these two mining claims, the Fossil and the Junebug, upon the lands which were embraced in the applications which Clarke made for the selection of these lands in lieu of the forest reservation lands. That the locations had been made on June 11, 1899, by posting the notices and marking the boundaries; that they discovered upon the surface of the ground at that time the evidences of their value in petroleum sufficient to induce them to expend their money in developing the same, and that they did spend it; and that they had demonstrated that their value for petroleum was vastly in excess of anything else, at least as early as the middle of July, 1899, more than four months before these applications of Clarke were made. They say, moreover, that from the time of the location on June 11, 1899, until the time the affidavits were made, the original locators and their successors in interest had been in continual possession and occupation of the lands, and had been engaged in developing them and mining the same, and had expended large amounts upon machinery and in working thereon, and that these things were done on the very highest point upon these lands and were perfectly notorious and openly visible to all who went upon the lands or in their vicinity. Notwithstanding this showing, a motion was made to dismiss these protests by this claimant, Clarke (Rec., pp. 55–57), which was denied by the Commissioner, and a hearing ordered. The motion to dismiss, as well as the petition in this case, discloses the grounds upon which the claim of Clarke rests.

Notwithstanding some arguments and statements that seemed designed rather to evade the logical conclusion from their position, it nevertheless appears that the position of our adversaries is, baldly, that nothing can stand in the way of a selection under the forest reservation lieu land act except something that appears on the land-office records; and that when Clarke went to the land office at Visalia and there found that there was no claim of record to these lands on the books of the office in that district, it did for all purposes appear that these lands were vacant and open to selection, and that when he presented the deeds, abstracts, and what they call selections, and the register and receiver took these papers from his hands and entered on the record the fact that he had made such claim, that ended the matter, and the Land Department had nothing whatever to do except to deliver him a patent at the earliest practicable moment.

THE RETURN OF THE SECRETARY.

But to this petition and the position taken by the petitioner the respondent made return, in which he gave a complete history of the proceedings before the Land Department and the grounds of his action. The return shows that the applications were made substantially as alleged in the petition, and that there were presented therewith affidavits *purporting* to be the non-mineral and non-occupancy affidavits prescribed by the Department. The return sets forth, then, the affidavit which Clarke actually filed and calls attention to the particulars wherein it differed from the form which had been

prescribed by the Department. (Rec., pp. 121–123.) As will be seen, immediately after the statement that the said tract applied for is "agricultural in character and contains no known deposits of coal or other minerals, and is not subject to entry under the coal or mineral land laws of the United States," the affiant interpolated the words "*This affidavit is made from the evidence found upon the surface of the ground. Deponent does not undertake to express any opinion as to what may be under the ground.*" It also appears that the applicant erased from the affidavit the words "THAT THERE IS NO OCCUPATION OF SAID LAND ADVERSE TO THE SELECTION THEREOF UNDER THE ACT OF JUNE 4, 1897," and the words "THAT NO PORTION OF SAID LAND IS CLAIMED FOR MINING PURPOSES UNDER THE LOCAL CUSTOMS OR RULES OF MINERS OR OTHERWISE."

It was then alleged by the respondent—

> that each and every of the allegations erased and omitted from the said affidavit by said Clarke were necessary and indispensable allegations for the purpose of enabling the said Clarke to select the lands in lieu of the land proposed to be relinquished, for the reason that if the said lands were occupied adversely to the selection thereof under the act of June 4, 1897, by any person or persons, or if any portion of said land was claimed for mining purposes under the local customs or rules of miners or otherwise, which said local customs or rules of miners are by act of Congress made a part of the mining laws of the United States, then said lands were not vacant lands open to settlement

within the intent and meaning of the act of June 4, 1897 (Rec., pp. 122–124).

He further alleged that—

> the words added to the affidavit of Clarke negatived and destroyed the force and effect of the averment of the affidavit as to the supposed known character of the land as nonmineral and as not being subject to entry under the coal and mineral land laws of the United States (Rec., p. 124)

The honorable Secretary then refers to the protest of the Kern Oil Company and the general facts contained therein and a separate protest filed on the 12th of February, 1900, of Elwood and others, in which they allege possession and occupancy of the land for oil and mining purposes substantially to the same effect. (Rec., p. 124.)

It is then stated that the matter in contest came on for hearing before the Commissioner of the General Land Office, "who, after a full, fair, and impartial hearing of the applications and affidavits in support thereof, decided that the allegations made in the protest should be investigated at the hearing, to be conducted in accordance with the following principles," and then sets forth the principles (*vide*, p. 124).

From this decision the appeal was taken to the Secretary of the Interior, and it was there fully, fairly, and impartially heard and duly and deliberately considered, and all of the applications, affidavits, briefs, printed and oral arguments made to and before him and the Assistant Attorney-General for the Interior

Department, acting in that behalf, were duly considered, and on the 25th of April, 1901, it was formally and officially decided that, inasmuch as the selector, Clarke, in making application for said lands, had not by proper averments or any averments shown or set forth that the lands were at the time of selection vacant lands, open to settlement, within the intent and meaning of the said act of June 4, 1897, of which fact of vacancy, it is charged as a matter of fact, the said selector was and the Land Department was not and could not have been cognizant, but so to set forth and show had wholly failed and neglected and willfully refused; therefore the said selector had not in and by his applications and affidavits shown himself entitled, as of the date of the said attempted selection, to select the lands or to obtain a patent therefor (Rec., p. 125).

Furthermore, that inasmuch as it then appeared to the honorable Secretary in proof and was admitted, and while the said lands so remained the property of the United States and opened to exploration, etc., and before the said selector, Clarke, had by proper averments shown that the lands were subject to selection, or that he was entitled to select the same as vacant lands open to settlement, the protestants had gone into possession and occupancy thereof and had made discovery of petroleum therein, and were claiming, working, and developing the same under certain placer mining locations, under the laws of the United States, and, as it then appeared and was admitted that the lands were, in point of fact, "valuable for mines and

minerals and worthless for agricultural purposes," that therefore the supposed selection of Clarke could never be made good by any proof that could thereafter be established, the order of the Commissioner directing a hearing was vacated and Clarke's selection rejected (Rec., pp. 124, 125.)

The return also recites that a motion for a review was made, which motion was fully argued before the Secretary orally, and again by him duly considered and denied and the former decision adhered to. He denies that he had illegally or arbitrarily held or decided any matter or thing whatsoever in respect to the application for selection. He claims that there was imposed upon him by the laws of the United States the duty to construe the acts governing the disposition of the public lands of the United States and applying the same to cases coming before him, and that in pursuance of those duties he was required to construe and apply the terms of the act of Congress of June 4, 1897, and that he did construe it, and all this after the parties had been fully heard. (Rec., pp. 126, 127.)

In addition to this return, we invite the attention of the court to the opinions delivered by the Secretary of the Interior in this case, made exhibits to the return as well as to the petition, the first of which will be found in the Record, pages 78 to 97, and second, the opinion on the motion for a review, in the Record, pages 105 to 120.

Subsequent to the original decision, which was made on April 25, 1901, to wit, on the 29th day of

May, 1901, the applicant made, or caused Barion to make, another affidavit, purporting to be an affidavit of nonoccupancy, and which affidavit appears to have been filed in the Land Department on the 5th day of June, 1901. (Rec., p. 104.)

This affidavit, made, as it was, nearly a year and a half after the application for a patent and after the decision in the cause, could not very well have established a right, if none had been established before; but we call particular attention to these facts: This affidavit was intended to heal the defect in the former affidavit in regard to the nonoccupancy. That portion of the affidavit which stated that the lands were not occupied was, as we have before stated, stricken out of the first affidavit. The same man now makes oath that said land was upon such date unoccupied, and that there was not then any occupation adverse to the selection made by Clarke under the act of June 4, 1897. But at the time this second affidavit was made there were already on file these protests and the affidavits in support of them, each and every one of which stated, not in general terms that the land was occupied, but exactly what had been done upon it.

Thus, in the Kern Oil Company's protest, which was duly verified, it was averred, among other things, that at the time Barion stated that no mining operations were being carried on upon said land or any part thereof, the truth was that on the east half of said Fossil placer mining claim and on the south half of the northeast quarter of said section 4, there were derricks,

machinery, tools, buildings, and appliances upon said placer mining claims of the value of at least $5,000, all of which matters and things said Barion well knew, if he went upon the land, as said machinery and buildings were upon the highest point upon said lands. (Rec., pp. 28–29.)

Keith swears to the boring of the wells upon those lands, and also says that they were bored under his supervision and were high upon the hills (Rec., p. 33); and all of the other affidavits treating of that subject showed the same thing.

Now, in Barion's supplemental affidavit he does not contradict any of these things or deny a single fact which they have stated, except in the general terms of nonoccupancy, from which it must be apparent that he was *simply swearing to the correctness of the legal conclusions* of the petitioner, that lands were not occupied unless they had been entered on the tract books of the local office.

Upon these facts it is submitted that the decision of the Land Department assailed here is correct, and that whether correct or not, it was the determination of the controversy by a special tribunal of competent jurisdiction, and its judgment can not be controlled by a writ of mandamus, whether right or wrong.

POINTS AND AUTHORITIES.

FIRST POINT.

The Land Department is a special tribunal, with judicial functions, having jurisdiction over all proceedings for the acquisition of the public lands, and in the exercise of that jurisdiction does and must determine all questions upon which depends the right of the applicant to a patent.

Under the power granted by the Constitution to dispose of and make all needful rules and regulations respecting the territory and other property of the United States, Congress has constituted the Land Department, under the supervision and control of the Secretary of the Interior, a special tribunal with judicial functions, to which is confided the execution of the laws which regulate the purchase, selling, care, and disposition of the public lands.

United States ex rel. McBride v. *Schurz*, 102 U. S., 378, 395, 396.

Barden v. *N. P. R. R.*, 154 U. S., 288, 326, 329.

In *United States* v. *Winona and St. P. R. R. Co.* (67 Fed., 948) the court, following many previous decisions, said that the Secretary of the Interior is charged with the supervision of the public business of the United States relating to the public lands. After showing that the Land Department of the United

States, including in that term the Secretary of the Interior, the Commissioner of the General Land Office, and their subordinate officers, constitute a special tribunal under these and other provisions of the laws of the United States, vested with the judicial power to hear and determine the claims of all parties to the public lands it is authorized to dispose of, and to execute its judgments by conveyances to the parties entitled to them, the court points out that when a claim under a grant to a railroad company is made to a portion of the public lands under its control, that tribunal must determine whether or not the claimant is the beneficiary of the grant; whether or not it has so far complied with its conditions that it is entitled to its benefit; whether or not the public land claimed is a portion of the grant, and whether or not any other party has a superior right to it. Again pointing out that when a claim is made under the homestead or preemption laws for a portion of the public domain that is subject to its disposition, the same tribunal must determine whether or not the claimant is qualified to acquire lands under the terms of those laws; whether or not the land claimed was subject to preemption or to entry for a homestead, and whether the claimant has so complied with the requirements of those laws as to entitle him to the title to the land, the court proceeds to say:

> Similar questions must be heard and determined by that department whenever any portion of the public lands, subject to disposition by that tribunal, is sold or otherwise disposed of in any way. In every case there must, in the

> nature of things, be a decision of questions of fact and of questions of law, because in every case the ultimate question is whether or not the facts proved show that the claimant is entitled to the land under the act of Congress. A survey or patent is record evidence of the judgment of this tribunal, and it necessarily follows that when such a judgment is rendered in a case within the jurisdiction of the Land Department, it is, like the judgments of other special tribunals, vested with judicial powers, *impervious to collateral attack*. (67 Fed., 965–966.)

The same principles there decided have been recognized in innumerable cases; among others in—

> *Lewis* v. *Shaw*, 57 Fed., 516–518.
> *Chapman* v. *Quinn*, 66 Cal., 266.
> *Poppe* v. *Athern*, 42 Cal., 607.
> *Germania Iron Co.* v. *James*, 89 Fed., 811, 813–818.
> *Hoover* v. *Salling*, 102 Fed., 716.
> *James* v. *Germania Iron Co.*, 107 Fed., 597, 600–602.

In *Barden* v. *Northern Pacific R. R. Co.* (154 U. S., 288), Mr. Justice Field said:

> The determination of the character of the land granted by Congress in any case, whether agricultural or mineral, swamp or timber land, is placed in the officers of the Land Department, whose action is subject to revision by the Commissioner of the General Land Office, and on appeal from him to the Secretary of the Interior. Under their direction and supervision

the actual character of the land may be determined and fully established.

154 U. S., 320–'32.

See further *id.*, 326–331.

See also *Knight* v. *U. S. Land Asso.*, 142 U. S., 161, 177; 35 L. Ed., 934, 980.

In *King* v. *McAndrews* (111 Fed., 860), a decision in the circuit court of appeals of the eighth circuit, it is again repeated that the Land Department of the United States, including in that term the Secretary of the Interior, the Commissioner of the General Land Office, and their subordinate officers, constitute a special tribunal, vested with judicial power to determine the claims of all parties to the public lands which it is authorized to dispose of, and with power to execute its judgments by conveyances to the parties entitled to them. A patent of land within its jurisdiction by the Land Department is a judgment of that tribunal, and a conveyance of the legal title to the land to the patentee in execution of the judgment, and when such a patent to lands within the jurisdiction of the Department is issued, it is like the judgment of other judicial tribunals, impervious to collateral attack (*Id.*, 863).

> The test of the jurisdiction of this tribunal is the true answer to the question, Had the Department the power to hear and determine the claims of the applicants of the land and to dispose of it in accordance with its decision? If that question can be answered in the affirmative, the Land Department had jurisdiction of the case, and the patent which evidences its decision

> conveys the legal title, and *is impervious to collateral attack*. If it must be answered in the negative, then its conveyance is void, and is as vulnerable in a collateral action at law as in a direct proceeding in equity to avoid it.
>
> Land the title to which has passed from the United States before the claim on which the patent is based was initiated, land reserved from sale and disposition for military or other like purposes, land reserved by a claim under a Mexican or Spanish grant *sub judice*, and land for the disposition of which Congress has made no provision is not intrusted to the disposition of the Land Department, is not within its jurisdiction, and hence its patents for such land are void on their face, and may be collaterally attacked in an action at law.
>
> But land which the Department is vested with the power and charged with the duty to hear and decide the claims of applicants for, and dispose of in accordance with its decisions, is within its jurisdiction, and its patents of such land convey title to it, and is impervious to collateral attacks, whether its decision is right or wrong. * * *

(The stars stand for the cases cited.)

The last case cited after this passage is *Barden* v. *R. R. Co.* (154 U. S., 288, 327; 38 L., 992, 1001). Judge Sanborn, continuing, says:

> In the case last cited the Supreme Court said: "It is the established doctrine, expressed in numerous decisions of this court, that wherever Congress has provided for the distribution of any

portion of the public land, of a particular character, and authorizes the officers of the Land Department to issue a patent for such land upon ascertainment of certain facts, that Department has jurisdiction to inquire into and determine as to the existence of such facts, and, in the absence of fraud, imposition, or mistake, its determination is conclusive against collateral attack."

And, continuing, he said:

> The test of jurisdiction is not right decision, but the right to enter upon the inquiry and to make some decision. * * * Hence a patent evidencing an erroneous decision of **a question of law or a mistaken determination of an issue of facts**, which the Department was vested with the power and charged with the duty to decide, is as impervious to attack as one which is the result of correct conclusion.
>
> The remedy for an error of law in the action of the Department regarding the title of land entrusted to its disposition is by a direct proceeding by a bill in equity to correct it. * * *
>
> The aggrieved party has a like remedy for the wrongful issue of a patent upon a misapprehension of the facts, which is induced by fraud or gross mistake.
>
> These established principles have been restated and these authorities have been again cited because they control the disposition of the case in hand, and because counsel for the defendant seem to be impressed with the view that every decision by the Land Department of the many grave and complicated issues which

condition the rightful issue of a patent is a *mere ministerial act*, open to collateral attack for every error of law into which the officers of that Department may fall, in every action at law in which the title under the patent is involved. * * * Such is not the law. The decisions of that Department are *judicial acts*. The patents it issues are the judgment of a *quasi-judicial tribunal*. In cases within its jurisdiction they are presumptively right, and as impervious to collateral attack for errors of law or mistakes of fact *as the judgment of the courts*, and all cases are within the jurisdiction of this Department in which Congress has entrusted the determination of the rights of the claimants, and the disposition of the land in accordance with its decision.

The real question in this case, therefore, Was this determination of the rights of the claimants to the land and the issue of a patent in consonance with that decision intrusted to this Department? The contention of the counsel for the defendants is that it was not, because the land was within the limits of an incorporated village when it was first entered by the patentee. The record of the trial of the case does not disclose the facts which conditioned the decision and judgment of the Department, which the patent evidences, that King was entitled to the land. But the general rule is that the disposition of the public lands of the United States is intrusted to this Department, and the patent itself is presumptive evidence both that the Department had the jurisdiction to decide whether or not the patentee was entitled to it, and that its decision of that question

was right. It follows that, if there might have been any state of facts which would have given the Department jurisdiction of this case and the power to issue patents of this land under the acts of Congress, the presumption is that such a state of facts existed, and that the Department had jurisdiction of the case. Upon this subject the Supreme Court said in *Refining Co.* v. *Kent*, 104 U. S., at page 646, 26 L. Ed. at page 878, that a patent, in a court of law, is conclusive as to all matters properly determinable by the Land Department when its action is within the scope of its authority; that is, when it has jurisdiction under the law to convey the land. (111 Fed., 863–866.)

See also—

Northern Pacific R. R. Company v. *Cannon*, 54 Fed., 252.

Steel v. *Refining Co.*, 106 U. S., 447.

Barden v. *Northern Pacific Railroad Company*, 154 U. S., 288.

St. Louis Smelting and Refining Co., v. *Kemp*, 104 U. S., 651.

SECOND POINT.

This jurisdiction of the Land Department continues until, by the issuance of a patent or by some action of the Land Department which acts of Congress have made the equivalent of a patent, the legal title has passed out of the United States.

In *United Sates* v. *Schurz* it was said:

Congress has also enacted a system of laws by which rights to those lands may be acquired and the title of the Government conveyed to

> the citizens. This court has in strong language upheld the doctrine that so long as the *legal title* to these lands remains in the United States, and the proceedings for acquiring them were as yet *in fieri*, the courts would not interfere to control the exercise of the power thus vested in that tribunal. To that doctrine we still adhere.
>
> *United States* v. *Schurz*, 102 U. S., 378–396.
>
> *Brown* v. *Hitchcock*, 173 U. S., 473, 478.

Now, the legal title to the public lands, the disposition of which has been confided to the Land Department, passes out of the United States, and the corresponding jurisdiction of the Land Department over them ends, only upon the happening of one of the following events:

1. When a patent issued under the seal of the United States and signed by the President has been delivered to and accepted by the party applicant. (*Moore* v. *Robbins*, 96 U. S., 530, 533.)

2. When, upon a decision of the Land Department that the party is entitled to a patent, the patent is duly executed and recorded, though not delivered, such record is a solemn public act of the Government and operates as an assurance by matter of record to vest the legal title in the applicant without delivery. (*United States* v. *Schurz*, 102 U. S., 376, 396–399.)

3. When by the terms of an act of Congress lands are granted *in presenti* under a general description, but to be thereafter identified, and the Land Department has *on its records* identified the lands by approval noted on the plat or otherwise, such identification of

record operates to complete the vesting of title under the express grant of the act. (*Noble* v. *The Union River Logging Co.*, 147 U. S., 165, 176, 177.)

In all of these cases it will be found that either a patent or some matter of record equivalent to a patent has been issued or entered by virtue of a decision of the Land Department itself. The first case is the normal one. In the two latter cases the action of the Department, being the equivalent of a patent, has vested in the applicants a legal title, and any attempt to deal with it afterwards by way of rescinding the patent or canceling the record, being clearly beyond the scope of the Department's authority, has been held to be controllable by mandamus or injunction.

> *United States* v. *Schurz*, 102 U. S., 278–297, 299.
>
> *Noble* v. *Union River Logging Co.*, 147 U. S., 165, 176–177.

See these cases explained in *New Orleans* v. *Payne* (147 U. S., 261, 263–264).

But no case has been found, and no case exists, where a court has interfered to command the action of the Department in the course of the procedure to obtain a patent, nor does any power so to interfere exist until by the action of the Department itself the legal title has passed out of the United States and the jurisdiction to dispose of the land has gone with the legal title.

> The power of the Department to inquire into the extent and validity of the rights claimed

against the Government does not cease until the legal title has passed. *Michigan Land & L. Co.* v. *Rust*, 168 U. S., 589, 593.

And no case can be found in which it has been held that an applicant in any proceeding pending before the Land Department and within its jurisdiction can by any mere action of his own, independently of the adjudicative action of the Land Department, divest the title of the United States and vest title in himself.

In a word, the only power which a court has to control the action of the Land Department by the collateral process of mandamus is to compel it to *deliver the evidence* of the Department's own decision whenever it is arbitrarily or capriciously withheld. And the only power in any court to control the action of the Land Department by the process of injunction is to prevent it from disturbing, unsettling, or divesting a legal title which by some previous action of its own has already vested in the citizen. (*Warner Valley Stock Co.* v. *Smith*, 9 App. D. C., 187.)

In addition to the above cases cited to support the proposition that the jurisdiction of the Land Department continues until a patent has been issued or action taken equivalent to a patent, we invite attention to the following:

Knight v. *U. S. Land Asso.*, 142 U. S., 161.
Diller v. *Hawley*, 81 Fed., 651.
Hawley v. *Diller*, 178 U. S., 476; 44 L., 1167.
Mich. Land & Lumber Co. v. *Rust*, 168 U. S., 589, 592–593.

THIRD POINT.

Inasmuch as the Land Department has not in this case, by any action or decision, divested the title of the United States, or vested title in the applicant, and thus put an end to its own jurisdiction, the issuance and delivery of a patent as evidence of a title has not been reduced to a mere ministerial duty.

It can not be disputed that the Land Department has plenary jurisdiction over the administration of the lieu land act of June 4, 1897.

In order to give jurisdiction to the Land Department, it is well settled that it is not at all necessary that the act of Congress providing for the disposition of a particular part of the public domain should expressly confer their jurisdiction. On the contrary, unless the act of Congress does specifically provide for some other tribunal to which is committed the administration of the particular law, the jurisdiction inheres in the Land Department. This was explicitly so decided in *Catholic Bishop of Nesqually* v. *Gibbons*, 158 U. S., 155.

1. *The lieu land act of June 4, 1897, contemplates the issuance of a patent, and no selection, therefore, is perfected until the actual issuance of a patent.*

Applying the doctrine stated in the second point of this brief, the case of the *Michigan Land and Lumber Co.* v. *Rust* (168 U. S., 589, 592, 593), shows that the instrument which usually operates to transfer a title from the United States is a patent, but that such effect may be, however, and sometimes is, given to some other act which is made the equivalent of the patent;

but, always where the granting act provides for the issuance of a patent, the rule is that nothing can become the equivalent of it, and that the legal title remains in the Government until the patent itself issues.

Now this lieu land act of June 4, 1897, does not make anything less than a patent the equivalent of it. On the contrary, it manifestly and expressly provides for patent, and hence the jurisdiction of the Land Department not only exists but continues until a patent is issued.

Orchard v. *Alexander*, 157 U. S., 372, 377.
Brown v. *Hitchcock*, 173 U. S., 473, 478.

Where an act of Congress provides for the disposition of the public lands in any particular way, and the lands to be purchased are to be selected by the purchaser, whether it be a State, a railroad company, or an individual, the selection is not made until it is approved. (*Wisconsin Central R. R. Co.* v. *Price County*, 133 U. S., 496.)

In that case it was held that when Congress had prescribed the conditions upon which a portion of the public domain might be alienated, and provided that upon the performance of the conditions a patent should issue to the donee or purchaser, and such conditions had been complied with, and nothing remains but to issue the patent, then the donee or purchaser is to be treated as the beneficial owner of the land. But when the official executive act prescribed by law remains to be done before the tract can be distinctly defined, and before a patent can issue, the legal and equitable

titles remain in the United States. Furthermore, it was held that the act of the Secretary of the Interior approving the selections of indemnity lands by a railroad land grant company to supply deficiencies in selection within the place limits is judicial, and until that is done the company has no equitable right in the selected tracts, and the rule was not affected by the fact that such a refusal was given under a mistake of law. In that case the *Sioux City and St. Paul R. R. Company* v. *Chicago, etc., R. R. Company* (117 U. S., 406, 408) was cited, and from that case the following passage was quoted:

> No title to indemnity land was vested until a selection was made by which they were pointed out and ascertained, and the selection made, approved by the Secretary of the Interior. (133 U. S., 513.)

On the same page the court said:

> The uniform language is that no title to indemnity lands becomes vested in any company or in the State until the selections are made, and they are not considered as made until they have been approved, as provided by the statute, by the Secretary of the Interior. (See pp. 511–514.)

The principle of these cases is applied to all of the laws for the disposition of the public lands. **The authorities are numerous and uniform that under every kind of law for the disposition of the public lands no title, legal or equitable, vests until the application is passed upon by this special tribunal and it has been**

determined that the party making the application possesses the qualifications and has done the things which the law requires of him and has paid the purchase price; even then the title is equitable merely and the jurisdiction of the Land Department is not yet ousted over the subject-matter.

And the acts of the local office, where they are authorized to permit an entry at all, are subject to revision, whether an appeal is taken or not.

Hosmer v. *Wallace*, 47 Cal., 461.

Stimson Land Co. v. *Rawson*, 62 Fed., 426.

When the pre-emption or homestead claimant has made final proof and payment and those proofs have been approved by the Commissioner of the General Land Office, the equitable title vests, and it is held to vest when the proof and payment are made, provided the lands were subject to selection under those laws; but in all these cases the proof is sent to the office of the Commissioner of the General Land Office, and if upon the face of those proofs he is of the opinion that the lands are not subject to such selection, or that the party was not qualified, he has the power to reject it, and frequently does so, and no title vests, legal or equitable. When the final proof and payment is established, while it may be attacked in the Land Department for fraud, yet in the absence of such an attack the matter is ended, and this because the event which constitutes the estoppel and gives conclusive effect to the proceedings has occurred. The Land Department has made the investigation and given its decision, and, having jurisdiction over the subject-matter, it has the

same force and effect that any other judgment of a tribunal of competent jurisdiction has in any other case. But until such final adjudication has been made a pre-emptioner or homestead claim might be and will be canceled upon proof of the mineral character of the land.

Coleman v. *McKenzie*, 28 L. D., 349.
Santa Clara Mining Association v. *Scorsur*, 4 L. D., 104.
Hooper v. *Ferguson*, 2 L. D., 712.

The same is true of railroad lands.

Zadig v. *Central P. R. R. Co.*, 20 L. D., 26.
Barnstetter v. *C. P. R. R. Co.*, 21 L. D., 464.
Stinchfield v *Pierce*, 19 L. D., 12.
Jones v. *Marsh*, 15 L. D., 196.
Royal K. Placer, 13 L. D., 86, 89.
United States v. *Iron and Silver Min. Co.*, 128 U S., 673.
C. P. R. R. Co. v. *Valentine*, 11 L. D., 328.

The same is true with reference to indemnity school sections.

Swamp v. *State of California*, 27 L. D., 411.
McQuiddy et al. v. *State of California*, 29 L. D., 181.
Walker v. *Southern Pac. R. R. Co.*, 24 L. D., 172.
Herral's case, 92 L. D., 553.

The same doctrine applies to homestead entries.

Spratt v. *Edwards*, 15 L. D., 290.

In all it is held, when these preliminary acts prescribed by the preemption laws, including the payment

of the price of the land, have been performed, the claimant for the first time acquires a vested interest in the premises occupied by him.

Worth v. *Branson*, 98 U. S., 11; 25 L. D., 86.
Hutchins v. *Lowe*, 15 Wallace, 77.
Frisbee v. *Whitney*, 9 Wall., 187.

The Government of the United States, as well as the contestant, is interested in determining whether or not a tract claimed is mineral.

Caledonian Min. Co. v. *Roan*, 2 L. D., 714, 719.
Magalia Gold Min. Co. v. *Ferguson*, 3 L. D., 234.

And if the question of the character of the land is properly presented at any time before a patent, the duty of the Department is to ascertain whether or not the land shows valuable deposits, either in an *ex parte* case or a contest.

Cole v. *Placer*, 13 L. D., 86, 89.
United States v. *Iron & Silver Min. Co.*, 128 U.S., 673, 685–686.

And after such investigation and determination has been made, until the final entry and payment, such hearing and decision does not preclude a further hearing. The judgment will be conclusive up to the date at which the former hearing was had, but not subsequent to that.

Spratt v. *Edwards*, 15 L. D., 290–292.
Stinchfield v. *Pierce*, 19 L. D., 12.
Dargan v. *Koch*, 20 L. D., 384.
Coleman v. *McKenzie et al.*, 28 L. D., 348.

These decisions were nearly all made at a time when the law excepted from the operation of the pre-emption

and homestead entries only known mines or known salines, and it was held that these known salines or mines meant known at the date of the sale.

Nicholas Abercrombie's case, 6 L. D., 393.
Harnish v. *Wallace*, 13 L. D., 109.

The same is held with reference to the entry of a town site.

Thomas J. Laney's Case, 9 L. D., 83.
Plymouth Lode Case, 12 L. D., 513.

And was applied to homestead entries.

Spratt v. *Edwards*, 15 L. D., 291.

And furthermore, this date of the sale in the case of a homestead is not the date when the original entry is made, but when the final proof is made and final payment.

Spratt v. *Edwards*, 15 L. D., 291.
Jones v. *Driver*, 15 L. D., 514, 518.
Rea v. *Stephenson*, 15 L. D., 37.

See also—

Barden v. *Northern Pac. R. R. Co.*, 154 U. S., 284.
Stimson Land Co. v. *Rawson*, 62 Fed., 426.

2. *The Land Department has not, by any action or decision in this proceeding, done anything to divest the title of the United States whereby any title, legal or equitable, has vested in the applicant.*

It is apparent from a glance at the forest-reservation lieu land act, which is quoted in the petition, and under which the proceeding to obtain the patent was taken by the applicant, that in every case that arises under

the act there are many questions to be determined, and, under the authorities which we have already cited, those questions are to be determined by the Land Department. In every case the following questions are necessarily involved:

1. Is the tract of land claimed by him covered by a patent?

2. Is the land which is claimed within the limits of a public forest reservation?

3. Is the applicant the owner of the tract?

4. Is the instrument tendered by the applicant sufficient in form as a relinquishment of the tract to the Government of the United States?

5. Are the lands selected by him, in lieu of said tract covered by a patent, vacant lands open to settlement?

6. Do the lands so selected equal in area the tract covered by the patent?

It is not until all of these questions are determined in the affirmative that the applicant is brought within the provisions of the act.

We proceed now to the consideration of what is shown by this record to have been actually done.

1. The applicant executed deeds to the lands in the forest reserve, acknowledged and recorded them, and produced those deeds, together with the affidavits of Barion, and an abstract of title, and the application itself for the selection of lands in lieu thereof, and gave them to the register of the local office at Visalia. The local officer certified that the lands selected were free from any claims on the records in his office, and these

papers, and also the protests which were filed, were forwarded to the Commissioner of the General Land Office. So far there is clearly no adjudication approving the proposed selection.

2 A hearing was had before the Commissioner of the General Land Office, in which that officer not only did not decide any one fact in favor of the applicant, but ordered a hearing to be had concerning the character of the lands selected. (For the opinion of the Commissioner, see Rec, pp. 57–71.)

3. From this decision of the Commissioner the applicant Clarke appealed to the Secretary of the Interior. (Rec., pp. 72–76.)

The case was there heard under the title of The Kern Oil Company and others against Clarke, and The Gray Eagle Oil Company against Clarke. After argument, both oral and written, before the Secretary of the Interior, the decision of the Secretary of the Interior was not only against selector (see Rec., pp. 78–97), but it concluded as follows:

> In view of the present occupancy and known value of the lands for mining purposes, as hereinbefore stated, it is apparent that the required proofs can not now be supplied. The selections are accordingly rejected. The order of your office directing a hearing is hereby vacated. (Rec., p. 97.)

Clarke made a motion for a review of this decision. (Rec., pp. 100–103.)

Which motion was denied in an opinion in which the

previous action of the Department was affirmed. (Rec., pp. 105–120.)

From this record of the proceedings it is perfectly obvious that, from the filing of the papers at the local office until the final rejection of the applications, nothing was done by way of approval of the attempted selections, but, on the contrary, at every stage of the proceeding the decision was adverse to the selector's claim.

3. *The register and receiver have no original jurisdiction to accept or approve the selection of land in lieu of land embraced within a forest reservation, or to pass such land to patent. Their duty is simply to receive the papers and transmit them for the action of the General Land Office.*

The claim is manifestly put forward in the petition for the writ of mandamus that by this action before the register and receiver of the Visalia land office an equitable title vested in the petitioner, and that it then and there became entitled to a patent. This is a complete misconception of the functions of the local officers. The action of the register and receiver did not amount to anything. They had no power in the premises, except such as was conferred on them by the regulation of the Department, and that regulation provided merely that the application and these other papers should be delivered to the register, and that the latter should forward the same to the Commissioner of the General Land Office, with his certificate of the state of the records in his own office. Neither the act nor

the regulations authorized them to decide anything, nor did it make them, or either of them, the agent of the Government to receive the deed. Their power was simply to act as the medium for the transmission of the papers of the applicant to the Commissioner for his consideration and determination.

In the petition it is suggested that by the act of January 27, 1898 (Statutes, 234), it was provided that the register and receiver for each land district shall have charge of and attend to the sale of public and Indian lands within their respective districts, and it is averred that upon the delivery and surrender of the deeds of relinquishment and the filing of the declaration of selection the register and receiver made further examination of the records of their said office, and, by virtue of the *original jurisdiction* conferred upon them by said act of January 27, 1898, then and there accepted on behalf of the United States the said deeds of relinquishment and the said declaration of selections and appended thereto their certificates, etc. (Rec., p. 10.)

And these averments are aided with liberal italics, apparently with the notion that in some way or other great force is added by those italicized words.

But the statute to which they refer has nothing whatever to do with the matter.

The act to which they refer is an amendment to section 2234 of the Revised Statutes, which by the amendment of January 27, 1898, was made to read as follows:

> SEC. 2234. There shall be appointed by the President, by and with the advice and consent

> of the Senate, a register of the land office and receiver of public moneys for each land district established by law, who shall have charge of and attend to the sale of public and Indian lands within their respective districts, as provided by law and official regulations. The receivers shall be accountable under their official bonds for the proceeds of said sales, and for all fees and commissions or other moneys received by them under provision of law or official regulation.

To say nothing of the fact that other laws even more forcible in expression as giving color to the supposition that they might have been intended to qualify or restrict the general powers which the Secretary of the Interior and Commissioner have over the disposition of the public lands, have been held to not have any such effect, this section of the Revised Statutes has no application to the laws for the disposition of public lands with which we are dealing.

The original section simply provided for the appointment by the President, with the advice and consent of the Senate, of the register of the land office and receiver of public moneys for each land district. The rest was added by that amendment. That section is in Chapter II of the Revised Statutes, under the title of "Public lands," and it is entitled "Registers and receivers," and their power and authority and duties generally are there prescribed.

The next chapter of the same title is entitled "Land districts." Chapter IV takes up the subject of preemption under the name of "Preemption." Chapter V

is entitled "Homestead," and deals with homestead entries. Chapter VI treats of the mineral lands and mining reservations. Chapter VII is entitled "Sale and disposition of the public lands," and this subject is dealt with in the Revised Statutes, beginning with section 2353, the first section of which is that "All the public lands, a sale of which is authorized by law, shall, when offered for public sale to the highest bidder, be sold either in half or quarter sections."

Then follows the scheme for the sale of these lands, which sales the register and receiver are to attend.

The reading of these sections upon this subject will show that the amended section was never intended to affect the supervisory power of the Secretary and the Commissioner of the General Land Office even as to those sales, and it has nothing to do with anything else.

Chapter VIII of the Revised Statutes is on the reservation and sale of townsites on the public lands.

Chapter IX, the survey of the public lands; Chapter X, of bounty lands.

It will thus be seen that the statute here referred to does not in any way qualify, modify, or change in any respect the laws which have been enacted for the disposition of the public lands.

4. *It is impossible, from the nature of the transaction, for the register and receiver to be in position to pass upon the essential elements of the selection or to determine its validity.*

The absurdity of the claim of original power in the register and receiver of the land office is made obvious

in this identical case. It will be seen that the land which is claimed by the petitioner to have been relinquished to the Government of the United States is located in the forest reserve known as the Cascade Reserve, in the State of Oregon, and the deeds of relinquishment were recorded in the office of the county of Klamath, in the State of Oregon. Now, as the register and receiver of the local office of Visalia, Cal., knew nothing whatever of the existence of any such reservation as the Cascade Reservation in Oregon, or of the state of the titles in Klamath County, it would be absurd to suppose that the Government of the United States had intended to confer upon local officers the power and jurisdiction to dispose of the public domain in exchange for lands in respect of which they had no knowledge and no means of information.

In the petition we are informed, in a rather mournful tone, that by section 2 of the act of March 3, 1883 (22 Statutes, 482), the registers and receivers of local land offices were required, upon application, to furnish official information as to what land was vacant and what lands are taken (the words vacant and taken being italicized), and then the petitioner avers that on the 14th day of December, 1899, Clarke made inquiry of these officers and received the information that the lands were vacant and open to settlement so far as appeared on the tract books and records in their office.

It will be observed that this act of March 3, 1883, was passed more than fourteen years before this forest

reserve exchange law, and therefore could have had no special reference to the administration of that law, nor is it at all limited in its application. Anybody has the right to go to the register and receiver and seek information as to what the records of their offices show with respect to the public lands, no matter what his object may be, and the register and receiver had been giving this information for fourteen years before this act was passed, and sixteen and more before this application was made; yet we have just cited numerous authorities to the effect that notwithstanding homestead claimants and preemption claimants, and States and railroad companies, and every other sort of corporations and individuals, have made entries or selections upon the faith of those statements of the register and receiver or the information obtained from their local records, nevertheless the entries have been canceled whenever in the judgment of the Department, upon proper evidence, they appear to have been improperly allowed.

There is in the information given by the register and receiver nothing except simply a statement as to what their own records show. Even if they made a mistake in that, there is nothing in the nature of an estoppel in it. But everything which they state may be true, and was true in this instance, when Clarke went there, yet there may exist *in pais* facts which make the selection impossible; to constitute a valid and insurmountable objection to the issuance of a patent to Clarke it is not necessary that the facts constituting

that objection should appear upon the records of the local office; for, as we shall show in a moment, there may exist an absolutely insurmountable objection and no record of it whatever exist upon the books of the local register and receiver.

For instance, under the mining laws it has been determined repeatedly by the courts of the country that when one has made a location in conformity with the laws of the United States there vests in him the right to the exclusive possession of his mining claim. In fact, the statutes expressly say so; and the courts go further, and say that not only does that right vest, but it withdraws the lands from the character of public lands, and that the Government of the United States itself can make no disposition of them adverse to the location.

Noyes v. *Mantle*, 127 U. S., 348.
Belk v. *Meagher*, 104 U. S., 279.
Forbes v. *Consolidated Mining Co.*, 94 U. S., 762.

In *Belk* v. *Meagher* (*supra*) it was, among other things, said that there was nothing in the act of Congress which makes actual possession any more necessary for the protection of the title acquired to such a claim by valid location than it is for *any other grant from the United States.*

In *Noyes* v. *Mantle* (*supra*) the court, after saying that when such locations were perfected under the law they were the property of the locators or parties to whom the locators had conveyed their interests, and after quoting from *Belk* v. *Meagher*, said:

> It is not, therefore, subject to the disposal of the Government. The section can apply only to lodes or veins not taken up and located so as to become the property of others. If any are not thus owned and are known to exist, the applicant for the patent must include them in his application, or he "will be deemed to have declared that he had no right to them."

But in locating a mining claim under the laws of the United States nothing ever appears in the local office in respect to its claim or its location, unless and until the owner of the claim desires to obtain a United States patent, and then he makes application to the local land office. But without such application the law does not require any entry to be made in the books of the local office, and none is made.

In the cases of *The Cosmos Exploration Co.* v. *The Gray Eagle Oil Co.*, and *Pacific Land and Improvement Co.* v. *The Elwood Oil Co.*, 112 Fed. Rep., 4, the court said:

> The contention of appellant, that the act of Congress has reference only to vacant land open to settlement which appears upon the books of the Land Department, can not be sustained.
>
> In the brief of appellant counsel say: "It is respectfully and confidently submitted that this word 'vacant' has never been held to apply merely to unoccupied public lands, but to all public lands which the records of the Land Office show are unreserved or unappropriated, whether actually occupied or not. In other words, the term 'vacant lands' in General Land

> Office parlance, from time immemorial, has meant simply this: Those public lands which are unreserved and unappropriated as shown by the records of the General Land Office.'

But after the quotation from the brief the court disposed of the contention thus:

> Some of the richest mineral lands in the United States, which have been owned, occupied, and developed by individuals and corporations for many years, have never been patented. It would be absurd to say that such lands were vacant and open to settlement because the books of the Land Department do not show that they have been settled upon. The possessory rights of the miners have always been recognized by law, although in all such cases the legal title to the land remains in the Government. (*Cosmos Exp. Co.* v. *Gray Eagle Oil Co.*, 112 Fed. Rep., 16.)

Under the homestead laws, a settler upon unsurveyed lands acquires thereby the right to make entry under the homestead laws if he possesses the proper qualifications, and the lands are subject to entry under those laws, which right he can exercise at any time within three months after the survey is made, and the approved plats filed in the United States land office; but it has been held under this forest-reserve law that the applicant may select unsurveyed as well as surveyed lands, and under the homestead laws one might be a settler upon land under the authority of the laws of the United States, and having the right to remain in possession and to obtain the title of the land, yet no

evidence of that fact would appear in the records of the land office.

5. *The applicant can not by the mere voluntary relinquishment of his own land divest out of the United States the land which he proposes to select in lieu of it.*

It has been insisted in this controversy that the applicant acquires some sort of a right by reason of the mere fact that he has, as it is claimed, delivered his deed to the Government. But it is obvious that he has not delivered it until the matters necessary to be determined have been passed upon by the Government and the deed accepted. The mere fact that a deed is placed in the hands of the grantee does not constitute a delivery. The grantee in all cases has the right to examine the deed to ascertain whether it is sufficient, and in this case the Department has the right to receive it and hold it until a reasonable time has elapsed for determining whether or not the land was subject to a selection, and all other questions which are involved in the right to a patent.

Harris v. *Harris*, 59 Cal., 620, 622.
Tiedeman on Real Property, sec. 812.
3 Washburn on Real Property, p. 254, sec. 28.
Los Angeles Immigration and Land Cooperative Association v. *Phillips*, 66 Cal., 539, 551–554.
Ryan v. *The United States*, 136 U. S., 68, 85, 86.

It must be plain that the selector can not, by handing in a deed of his own property containing the statement that he relinquishes it *in order to accept in lieu thereof other land to be thereafter selected*, by that mere

act alone divest out of the United States whatever land he chooses to select without the United States being able to pass upon the character and nature of the land thus sought to be taken, or upon any other question on which his right to select it depends.

Furthermore, if the claim be that, by his relinquishment, he has parted with his own land to the United States, and has the right, therefore, to select an equal area in lieu thereof, then the answer is that the rejection of his *first* application to select does not in any manner impair the interest of the applicant. It simply determines that the particular lands which he then seeks to select are not subject to selection, but it does not deprive him of the right of selecting other lands which are subject to selection. That this was the theory of the law upon which the selector himself acted is conclusively shown by the fact that in the surrender of his lands for the purpose of thereafter making a selection he surrendered 12,789 acres in one body and by one deed (Rec., p. 3–4), whereas the land which he selected at the same time was not to exceed 200 acres. It is obvious that he conceives himself to have at the present time the right to select over 12,500 acres additional, and if his claim to the 200 acres is rejected, his right to select the full number of 12,789 acres remains unaffected and unimpaired as at the beginning.

But whatever may be the exact nature of the right of the selector, after he has voluntarily made a conveyance of his own land "for the *purpose of thereafter selecting* other lands in lieu," it is clear that the claim

that his own conveyance completes the transaction and takes away the land in lieu is altogether dependent upon a construction of the act that will leave the Land Department nothing in the world to do. In other words, his case is dependent upon the assumption that his right to the selected land vests because there remains, after the relinquishment, nothing whatever to be done except for him to indicate the land he desires to take. This proposition the petitioner seeks to maintain by arbitrarily construing the term "vacant land open to settlement" to mean merely land in respect of which there is no record of appropriation upon the records of the local register, which are thus made absolutely conclusive as to the character and description of the land.

"If," says the petitioner, "land not taken of record at the local office happens to be in the lawful occupancy of a person initiating a right, or to be the lawful property and in possession of miners under valid mining claims, perfected by location and discovery, it is, nevertheless, vacant for my purposes, and so much the worse for the miners."

We shall now endeavor to show that the act of June 4, 1897, construed in conjunction with the other Public Land Laws of the United States, can have no such meaning.

FOURTH POINT.

The Land Department is correct in its construction that the term vacant lands open to settlement excludes mineral lands and lands occupied under the local customs or rules of miners.

The regulations based upon that construction are consequently valid.

One of the claims put forward in the petition for the writ of mandamus is that the Land Department had no power to make the regulation which the selector, Clarke, failed to comply with. It is obvious that the validity of this regulation rests upon the true construction of the act of June 4, 1897, in conjunction with all the other statutes of the United States governing the disposition of the public domain, all of which are in pari materia and form the body of Public Land Law of which this particular act is but a part.

The true construction of the term "vacant lands open to settlement" can not be reached by looking simply at the act of 1897 alone. The land subject to be taken is not merely "vacant" land, but it must be also "vacant land open to settlement." Now, not only is the word "vacant" itself one of various significations, both in common speech and in legal terminology, but the term "open to settlement" refers us at once to all the other legislation upon the subject-matter in which provision is made as to the sorts and descriptions of lands which may be taken up under the land laws, and the different modes of procedure by which title to them may be acquired.

The main ground urged in the petition and briefs against the validity of the regulations requiring an affidavit of nonoccupancy is that the word "vacant," as used in this act, means unappropriated on the tract books of the local land office, and has no reference to the actual occupancy of the land itself, no matter how lawful that occupancy may be.

Counsel reiterate in the petition a favorite dogma of theirs that "vacant land open to settlement" has had fixed upon it a meaning by Congressional, judicial, and departmental usages and interpretation, and that such meaning is "public land appearing on the records of the Land Department as land not taken up and occupied." They have never yet succeeded in producing the long Congressional usage or judicial interpretation or anything else fixing any such meaning. On the contrary, decisions are numerous, under various acts of Congress, where the term "vacant" has received no such meaning and has been held to have been used in no such sense. Indeed, the meaning of it generally is just what all understand it to mean—unoccupied—and where it has any different signification that fact is usually discernible from the context. Thus, in reports of the Land Department to Congress, in giving out statistics concerning the public business, no doubt when they speak of so much land having been sold and so much more remaining vacant they have reference to their own records, for they could not know what lands were actually occupied. But, according to the Standard Dictionary, the word "vacant" means "containing or holding nothing; being without contents or occupants; especially devoid of occupants; empty, unfilled; unoccupied; void; as a vacant house, room, or chair." Again, "vacant," as used in the case under consideration, is considered by the Land Department to mean unoccupied. See the opinions delivered in this case and set forth both as a part of

the petition for the writ of mandamus and of the return. It was considered in the same manner by the United States circuit court of appeals in the ninth circuit, in *Cosmos* v. *The Gray Eagle Oil Co.*, and *The Pacific Land and Improvement Co.* v. *Elwood Oil Co.*, 112 Fed., 4, 14–18. In *Atherton* v. *Fowler*, 97 U. S., 513, this court, after saying that at the moment the land on which the hay was cut became liable to preemption the whole of it was by the various persons claiming under Vallejo (1) settled on by them in person; (2) inhabited and improved by them; and (3) that a dwelling house was erected on it by them, said:

> Unless some reason is shown not found in this record, these were the persons entitled to make preemption and no one else. But suppose they were not. Does the policy of the preemption law authorize a stranger to thrust these men out of their houses, seize their improvements, and settle exactly where they settle, and by these acts acquire initiatory right of preemption? * * * The right to make a settlement was to be exercised on unsettled land; to make improvements on unimproved land; to erect a dwelling house did not mean to seize some other man's dwelling. It had reference to *vacant land*, to *unimproved land*, and it would have shocked the moral sense of the men who passed these laws if they had supposed that they had extended an invitation to the pioneer population to acquire inchoate right to the public lands by trespass, by robbery, by violence, by acts leading to homicides and other crimes of less moral turpitude.

See also the numerous cases cited in the Cosmos case, at the pages referred to, namely, pages 14–18, and the case of *Shaw* v. *Kellogg* (170 U. S., 312), from which this passage was quoted:

> The grant was made in lieu of certain specific lands claimed by the Vaca heirs in the vicinity of Las Vegas, and it was the purpose to permit the taking of a similar body of land anywhere in the limits of New Mexico. The grantees, the Vaca heirs, were authorized to select this body of land. They were not at liberty to select lands *already occupied by others. The lands must be vacant.*

This is the word used in the act. They were entitled to select other "vacant lands," which the court here manifestly construed to mean unoccupied.

No matter, then, how many acts of Congress or public documents may be produced wherein this word "vacant" may appear to have, or actually have, a more restricted signification, it is perfectly obvious that it can have no such meaning here. The language of the act is "vacant and open to settlement." Now, in many of these cases (which are cited in the opinion in the Cosmos case) it has been decided that lands occupied by one are not open to settlement by another; and as to the mineral lands, they, as a matter of law, are not open to settlement. Even that title which comes merely by location does not require a possession in order to maintain it, as was shown in the cases already cited (*Belk* v. *Meagher*, *supra*). The Government of the United States has by all of these

laws, by the preemption laws, though now repealed, and by homestead laws invited all persons possessing the qualifications required by those statutes to go upon the public lands and make a settlement and make improvements thereon, and under some of them, especially the preemption and homestead laws, making these improvements and the cultivation of the land were essential conditions to obtaining the title. Under the mineral laws all citizens of the United States are licensed and invited to occupy them and explore them for the purpose of developing the mineral resources of the United States, and when the people have, in pursuance of this invitation and license, gone upon these lands, either for the purpose of making a settlement and acquiring title for agricultural purposes or for exploring them for minerals and developing their mineral resources and working the same, it would require language far stronger than any that is employed in the act of 1897 to support the contention that the Congress of the United States intended to license these forest-reserve claimants to dispossess all persons claiming under any laws, unless their claims were placed of record in the office of the district where the lands were situated.

Although it is not denied by us that Congress might have the power to deprive one who has gone upon the public lands under its invitation of the improvements which he has put upon it, and of the labor and money expended in its development, at any time before a vested equitable title has accrued, yet the courts do

not indulge in strained construction of statutes to accomplish any such unjust and mischievous result. The situation here, indeed, is stronger than that; under the showing made by the protestants in this case, they had a perfect right, which even Congress could not interfere with by any act for the disposition of those lands. But, apart from that, we respectfully submit that there is nothing in the language of the act under consideration which justifies the belief that Congress had any intention whatever of authorizing the invasion of other people's houses or taking other people's property put upon the public lands of the United States under the invitation of the laws of the United States.

FIFTH POINT.

The regulations requiring a nonmineral and nonoccupancy affidavit, being based upon the true construction of the term "vacant land open to settlement," are an appropriate and necessary means for carrying into effect the intent and true meaning of the act of June 4, 1894.

As we have seen the chief claim which is put forth in the petition for the writ of mandamus is that the Department had no power to make the regulation of which they complain, and with which the selector did not comply. And this both as to nonoccupancy and nonmineral character. But the nonmineral affidavit is no new thing. The regulation requiring nonmineral affidavits has been in force for many years, and it is required from all applicants for lands under any laws except the mineral laws, and with the exception

of certain States which have been taken out of the operation of the general rule. The mineral lands can only be acquired under the laws providing for the disposition of those lands. If the regulation was unreasonable with respect to Clarke and his selections, it must be equally so as applied to all other selectors. As we said before, that is not a regulation directed against forest lieu claimants only, but against all applicants to purchase public lands. The regulation will be found in the pamphlet printed at the Government Printing Office in 1899, and the rules issued on July 11, 1899, and on page 87 of this circular, under the title of "general rules applicable to different classes of entries."

The twenty-fourth rule is as follows:

> In all entries of nonmineral land in the States of Arkansas, California * * * a nonmineral affidavit is required.

The stars above are for the other States and Territories of the United States, but as these lands are in California it is sufficient to show that that was one of the States included; and this, we say again, is a general regulation. Did not the Department have the power to prescribe such a regulation? It has been decided frequently by this court, as well as other tribunals, that since the passage of the acts of July, 1866, and of 1870 and 1872, and the various amendments thereto, expressly providing for the disposition of the mineral lands, such lands are not subject to disposition under any other general laws whatsoever. It does not

require any exception of mineral lands from an act of Congress providing for the distribution of the public domain, but they stand excepted. It follows that if the Department has any power to make regulations at all, it must have the power to make such regulations as will prevent the taking up of mineral land under color of laws not providing for their disposition. That the Department has the power to make regulations has also been frequently decided.

> *Knight* v. *The U. S. Land Ass'n*, 142 U. S., 161, 177.
>
> *Catholic Bishop of Nesqually* v. *Gibbon*, 158 U. S., 155.

See also *Germania Iron Co.* v. *James*, 89 Fed., 811, 813–818, and the authorities there cited; and

> *Hoover* v. *Salling*, 102 Fed., 716.
>
> *James* v. *The Germania Iron Co.*, 107 Fed., 600–603.
>
> *United States* v. *Winona and St. Paul R. R. Co.*, 67 Fed., 948.
>
> *Lewis* v. *Shaw*, 67 Fed., 516–518.

And, finally, in the controversy arising upon these very attempted selections, in *Cosmos Exploration Company* v. *The Gray Eagle Oil Co.*, and *The Pacific Land and Improvement Co.* v. *The Elwood Oil Co.*, 112 Fed., 4, after a careful examination of the legislation relating both to mineral lands and forest lien selections, it was determined by the circuit court of appeals for the ninth circuit that these identical regulations were not only within the power of the Department, but were reason-

able and valid. The conclusion of the court is as follows:

> The Commissioner of the General Land Office has authority to make regulations respecting the disposition of the public land, and such regulations, when not repugnant to acts of Congress, have the force and effect of laws. The regulations of the Commissioner relative to lieu land selections under the act of June 4, 1897 (prescribed June 30, 1897), are in our opinion reasonable, and evidently were intended, and are well calculated, to carry into effect the intent and true meaning of the act of Congress. They are properly within the limitations of the law for the enforcement of which they were promulgated, and should be complied with. (112 Fed., 11, 12.)

The other objection to the action of the Department complained of by the petitioner is that it had no power to prescribe the regulation requiring and asking an affidavit of nonoccupancy, and the reason urged is that the word "vacant" as used in this act means merely unappropriated on the tract books of the local land office, and has no reference to the actual condition of things upon the land itself.

But in the discussion of the true meaning of the term "vacant land open to settlement," we believe that we have already shown this contention to be groundless. (See authorities already cited under the FOURTH POINT.)

Attention is drawn in the brief of counsel for the petitioner to the case of the *United States* v. *Frederick*

G. Maid, in the district court for the southern district of California, as a supposed authority against the power of the Secretary to make the regulation complained of in this case. It is furthermore urged that the Secretary, in his appeal to Congress, has admitted the invalidity of such regulation. (Rec., pp. 130, 131.) But in this very case of *United States* v. *Maid* the regulation requiring a noncmineral affidavit was expressly recognized as valid for the purposes of determining *property* rights, although it might not have been the intention of Congress to make an infraction of it a criminal offense.

> "A Department regulation," said the court, "may have the force of law in a civil suit to determine property rights, as in *Cosmos Exploration Co.* v. *Gray Eagle Oil Co.* (*supra*), and yet be ineffectual as the basis of a criminal prosecution (*United States* v. *Eaton*, *supra*). The Supreme Court of the United States, in the case last cited, marks the distinction thus:
>
> "'Regulations prescribed by the President and by the heads of departments, under authority granted by Congress, may be regulations prescribed by law, so as lawfully to support acts done under them in accordance with them, and may thus have, in a proper sense, the force of law; but it does not follow that a thing required by them is a thing so required by law as to make the neglect to do the thing a criminal offense in a citizen, where a statute does not distinctly make the neglect in question a criminal offense.'" (*United States* v. *Maid*, 116 Fed., 650, 652.)

The doctrine thus laid down in *United States* v. *Eaton* (144 U. S., 677), and relied on to mark the distinction between the civil purposes and the criminal effect of a regulation, is again expressly recognized and affirmed by this court in the case of *Caha* v. *The United States* (152 U. S., 209).

And the Secretary, in his request for further legislation, plainly indicates that what is required is merely further provision for criminal prosecution.

SIXTH POINT.

The writ of mandamus was properly refused.

Upon the authorities already cited, it is submitted first that the decision of the Secretary of the Interior was a correct application of the law under which this controversy arose; that "vacant" has no reference to the tract books in the local land office, but it has reference to the land itself; that all of the supposed hardships of which the plaintiff in error complains are exactly the same that are encountered by every other person who goes to the land office to enter lands under any other law.

For example, preemption and homestead claimants were constantly being advised by the register and receiver, under this same act of 1883, for fourteen years before the passage of this forest-reserve act, that lands which they sought to obtain did appear upon the books to be free and open to settlement and claim by them. Nevertheless the cases are numerous where, notwithstanding such information, and notwithstanding that such persons had made entry upon it, or at least had

taken the initiatory steps, and had cultivated and improved the lands at great expense, still, by reason of discoveries made afterwards, their claims were defeated because the lands were not of the character subject to selection—an event which could not have occurred to them if the tract books and other records in the local office alone were to determine such questions.

The records of the local office did not show any claim of record in the preemption controversies and controversies with homestead claimants that were considered and determined in the cases to which we refer. See those cited in the opinion of the circuit court of appeals of the ninth circuit in *Cosmos Exploration Co.* v. *Gray Eagle Oil Co.*, 112 Fed., 4, 14–18. We allude to the case of *Atherton* v. *Fowler*, and a large number of others, in which the doctrine there laid down has been followed. That doctrine is that these preemption and homestead laws did not authorize one person to invade the possession of another and seize the property which he had placed upon the public lands; that lands which were occupied by another were not subject to such claims.

But this also was a conclusion which could not have been reached if the records of the local office were alone to be looked to for the character of the lands. The principles decided in those cases are of universal application. In *Basey* v. *Gallagher* (20th Wallace, 670, 681–682), the court said:

> In the late case of *Atchison* v. *Peterson* we had occasion to consider the respective rights of miners to running waters on the mineral lands of the public domain; and we there held

that by the custom which had obtained among miners in the Pacific States and Territories, the party who first subjected the water to use, or took the necessary steps for that purpose, was regarded, except as against the Government, as the source of title in all controversies respecting it; that the doctrines of the common law declaratory of the rights of riparian proprietors were inapplicable, or applicable only to a limited extent, to the necessities of miners, and were inadequate to their protection; that the equality of right recognized by that law among all the proprietors upon the same stream would have been incompatible with any extended diversion of the water by one proprietor. * * * That the Government by its silent acquiescence had assented to and encouraged the occupation of the public lands for mining; and that he who first connected his labor with property thus situated and open to general exploration did in natural justice acquire a better right to its use and enjoyment than others who had not given such labor; that the miners on the public lands throughout the Pacific States and Territories, by their customs, usages, and regulations, had recognized the inherent justice of this principle, and the principle itself was at an early period recognized by legislation and enforced by the courts in those States and Territories, and was finally approved by the legislation of Congress in 1866.

Now, it will be noted that Mr. Justice Field is, in this opinion, dealing with the condition of things prior to the first act passed by the Congress of the United

States for disposing of the mineral lands, and he said that the Government, by its silent acquiescence, had *assented to and encouraged the occupation of the public lands for mining*, and because of this "he who first connected his labor with property thus situated and open to general exploration did, in natural justice, acquire a better right to its use and enjoyment than others who had not given such labor."

But, since the passage of the mining laws, there is no longer a mere *silent acquiescence*, but in express terms these mineral lands are declared open to exploration and occupation. (R. S., secs. 2319, 2320.)

Under the showing made by the protestants here, they had valid mining locations completed and perfected, so that the lands were no longer part of the public domain, and were not subject to the disposition of the Land Department; but even if the claim of the petitioner were correct, namely, that they lack one element of the perfected locations, namely, the discovery of the mineral, yet nevertheless they were there, claiming under the mining laws, in the occupancy of the land, and having expended large sums in the construction of buildings and erecting machinery for the exploration of these lands, and were exploring them, and they were not "vacant" in the sense of the statute.

But if we are mistaken in this, it nevertheless does appear on the face of the statute itself that many questions must necessarily be determined by the Land Department before a patent can issue in these cases,

and that in arriving at that determination the Department acts judicially, and in these cases the very opinions delivered by the Commissioner and the Secretary of the Interier do of themselves show that the character of questions there submitted to them by the plaintiff in error, as well as by the adversaries, were judicial in character.

For example, viewed in its most favorable light, the case of the plaintiff in error is still dependent upon the assumption that the construction which it places upon the act of June 4, 1897, is its perfectly obvious and indisputable meaning, yet not only the Commissioner of the Land Office and the Secretary of the Interior (twice acting with the advice of the Assistant Attorney-General), but four courts, to whom that construction has been proposed, have all united in rejecting it.

If all these tribunals can reach a conclusion contrary to the construction contended for by the plaintiff in error, it is but according to the members composing them the possession of ordinary faculties to infer that the act is at the least reasonably susceptible of two constructions. If susceptible of two constructions, its administration can not be a purely ministerial act. Whatever may be the power of any court having jurisdiction over the land itself to construe acts upon which the title to it depends, it is clearly not the function of the courts of the District of Columbia to adjudicate such title or by mandamus to impose one construction rather than another upon the Land Department. The power of the courts of the District of Columbia is

limited to commanding the performance of a simple, definite statutory duty—a duty which involves no judgment and no discretion. But the choice between two reasonably possible constructions of which a statute is susceptible is neither a simple nor a definite duty. It is surely not ministerial.

But the questions dealt with by the Land Department were the same questions that were submitted to the circuit court of the ninth circuit, and dealt with by Judge Ross in the opinion in the Cosmos Exploration case and *The Pacific Land and Improvement Company* v. *Ellwood*, reported in the 104th Federal Reporter. From which decision the appeal was taken, and which was determined by the circuit court of appeals in the 112th Federal Reporter.

When these courts were dealing with these questions they certainly were acting in a judicial character, and the questions which they were considering were judicial. Were they any different when they were before the Department? The Department was necessarily called upon to construe the act. It had jurisdiction over the subject-matter and of the parties, and it did construe it; and whether that construction was right or wrong, its discretion can not be controlled by the writ of mandamus.

The principle here contended for is so familiar and well settled that we do not deem it necessary to do more than present a few of the authorities upon that subject.

Litchfield v. *Richards*, 9 Wall., 575, 577.
Gaines v. *Thompson*, 7 Wall., 347.

Noble v. *Union River Logging Co.*, 147 U. S., 165, 176, 177.

City of New Orleans v. *Paine*, 147 U. S., 261, 263, 264.

United States ex rel. Dunlap v. *Black*, 128 U. S., 40, 45.

Decatur v. *Paulding*, 14 Pet., 497, 499.

Furthermore, if any doubt may rightfully exist in the mind of the court on the subject, an answer is furnished to the application for mandamus. (*Carrick* v. *Lamar*, 116 U. S., 423, 426.)

If the act be one requiring the exercise of judgment or discretion, whether in the ascertainment of fact *or the interpretation of law*, it makes no difference how gross an error may be committed or however ill advised the action of an executive officer may be.

Seymour v. *South Carolina*, 2 App. D. C., 240, 245.

Lochren v. *Long*, 6 App. D. C., 486, 505, 506.

Nor will the writ be issued merely because the law has not provided any other remedy. Said the Supreme Court of the United States:

> The writ of mandamus can not be issued to compel the court below to decide a matter before it in a particular way, or to review its judicial action had in the exercise of legitimate jurisdiction. The writ can not be issued to perform the office of an appeal or writ of error, even if no appeal or writ of error is given by law. (*In re Isaac L. Rice*, 155 U. S., 396, 463.)

See also the case cited—*American Construction Company* v. *Jacksonville T. & K. W. R.* (148 U. S., 372, 379.)

SEVENTH POINT.

Lands in which petroleum exists are mineral lands under the mining laws of Congress.

The petitioner has reached the conclusion that petroleum is not a mineral, and that, though the acts of Congress, especially that of February 11, 1897, provide that they may be entered as mining lands, Congress did not thereby intend to declare that they were mineral lands.

For the fact that they are not mineral we are treated to a dissertation upon the most recent views of scientists as to the nature of petroleum and its origin, and that Congress did not intend to define petroleum as a mineral by the act of February 11, 1897, a lengthy discourse on the Stone Act of 1892, and the construction of it by the Department, wherein it seems to have been held that the fact that they might be entered under the mining laws was not the equivalent of declaring them to be mineral.

But, ingenious and entertaining as this disquisition is, as an abstract matter, we are here dealing with the act of Congress, and the events and constructions of laws which gave birth to it. Prior to a decision of Secretary Smith, in August, 1896, there had been repeated decisions of the Land Department that petroleum was a mineral, and subject to be entered under the mining laws. This opinion had been entertained by several Secretaries of the Interior, and among them Secretary Teller and Secretary Lamar.

In the case of Samuel E. Rogers, decided December 16, 1885 (4 L. D., 284), certain locations made under

the placer mining laws, embracing lands containing deposits which were valuable for petroleum, were sanctioned and sustained. And so in *Roberts* v. *Jepson* (4 L. D., 60) the same rule was made. And so in the case of the Piru Oil Company, decided February 13, 1893 (16 L. D., 117 L. D.), an application for a patent based upon four placer locations, embracing an aggregate of nearly 640 acres of land, containing valuable deposits of oil, was recognized and sustained as within the provisions of the mining laws. And the doctrine of these cases was never disturbed until the decision of Secretary Smith of August 27, 1896, which was a complete departure from the rule which had been established and long maintained by his predecessors.

At the very next session of Congress after this decision of Secretary Smith that body passed the act referred to in the appendix to the brief of the petitioner. That it was intended simply to overrule the decision of Secretary Smith is perfectly obvious upon the face of it. We call attention to one or two of its phrases for the purpose of showing that Congress was not simply providing a means of entering the lands containing petroleum, but that they were considered mineral. The title of the act is this: "An act to authorize the entry and patenting of lands containing *petroleum and other mineral oils* under the placer mining laws of the United States." Here, in the title of the act, petroleum is obviously classified as a mineral oil, and the act intended to provide for the entry and patenting not only of the petroleum, but any other mineral oils.

Then in the body of the act, after providing that any person authorized to enter land under the mining laws of the United States may enter and obtain patents to these lands, it describes them thus: "Containing petroleum or other mineral oils, and chiefly valuable therefor."

And in the proviso the language is this:

> *Provided*, That lands containing such petroleum or other mineral oils, which have heretofore been *filed upon, claimed, or improved as mineral*, but not yet patented, may be held and patented under the provisions of this act, the same as if such *claim, filing, and improvement* was subsequent to the passage thereof.

It is of no consequence whether Congress was scientifically correct or incorrect. The lands belonged to the United States, and Congress had the power to provide for the disposition, and for that purpose to make a classification of the lands, and it has done so by language too plain to be mistaken.

"But," say counsel, "because of the peculiar phraseology of this act, no right in these lands would exist until they were entered;" which means, as we understand it, that, by making a location—that is, marking the boundaries and posting and recording the notice, which, although not required by act of Congress, is always resorted to as a means of notifying the world of the claim and discovering the mineral—no right whatever would accrue. In other words, that such locator would not, as declared in the Revised Statutes,

become entitled to the exclusive possession of the property. If this were so, it would seem that there would be no necessity for the location at all, no need of marking boundaries nor of doing any other thing to make the claim.

But, by turning to the Revised Statutes, it will be seen that the very same language here employed in this act of 1897 is used with reference to the placer mines in the general mining statute, namely, that placer mines may be *entered* in the manner provided for the entry of lode claims, but the courts have uniformly held that all of the other provisions apply, as, of course, they must, because under those laws an essential prerequisite of making an entry, either of the lode or placer, is that one must make the location, and it must conform as nearly as practicable to the United States surveys in the case of a placer location; and as these lands are to be entered under the placer mining laws, so, too, in making the location, they must conform to the survey, and must not exceed 20 acres to one claim or 160 acres to an association of eight persons.

Again, the proviso shows that counsel for the appellant do not correctly interpret this statute. We quote it again:

> *Provided*, That lands containing such petroleum or other mineral oils, *which have heretofore been filed upon, claimed, or improved as mineral*, but not yet patented, may be held and patented under the provisions of this act, the same as if such filing, claim, or improvement was subsequent to the date of the passage hereof.

To say nothing of the fact that the "filing" here obviously refers to the filing of the notice of the location, and which is not done in the United States land office, the other provision shows that there need not, under the statutes of the United States, be even that.

But if it has been *claimed*, in whatever manner, or *improved*, such claimant may continue to hold and may enter it and have it patented in precisely the same manner as if the filing, claim, and improvement had been made subsequent to the passage of the act. But if made subsequent to the passage of the act, according to the claims of counsel here, they would acquire no rights, and therefore the provision giving a like effect to claims which had been made before the act simply meant that they had no effect at all.

But that is not the interpretation. It was well known to the Congress of the United States that on the faith of the previous decisions of the Department a large number of persons had located petroleum lands under the placer-mining laws, and that this decision of Secretary Smith had rendered those locations nugatory so far as the obtaining of a patent was concerned, notwithstanding that they may have been made and explorations conducted at great expense to the parties; and Congress not only overruled Secretary Smith's decision, but gave effect to those locations which had been made prior to the decision in a like manner as if they had been made after the passage of the act.

EIGHTH POINT.

Having failed to bring his attempted selection within the terms of the statute by an averment in compliance with the regulation validly made to carry the statute into execution, no title whatever vested in the selector, Clarke, and none inheres in the petitioner claiming under him.

If the foregoing argument is not wholly unfounded, it must be taken as established: First, that vacant lands open to settlement exclude lands which are mineral in character and which are occupied under the customs or rules of miners; second, that the regulations which require averments to the foregoing effect are at once reasonable and necessary. It must follow, then, that if a person seeking the benefit of this act fails to comply with the requirements thus validly established, it is impossible that any duty can arise on the part of the Department to grant the relief which he prays—that is to say, to issue a patent in exchange. And unless a duty exists to issue a patent, it is obvious that he can not be regarded as entitled to it. The duty of the Department to issue and the right of the applicant to receive are identical in time as well as in law.

As was well said by the United States circuit court of appeals for the ninth circuit, the "party making an exchange of land under the forest-reserve act, like any other entryman upon the public land of the United States, only secures a vested interest in the lands which he has selected in exchange for or in lieu of the lands relinquished by him when he lawfully enters upon the same, and IN ALL RESPECTS COMPLIES WITH THE

REQUIREMENTS OF THE LAW UNDER WHICH HE CLAIMS HIS RIGHT. This general principle is too well settled to require any elaborate discussion. It has been so decided by this court in *Mortgage Company* v. *Hopper*, 12 C. C. A., 293; 64 Fed., 553–555; *Diller* v. *Hawley*, 26 C. C. A., 514; 81 Fed., 651–653." The latter case was brought to this court and was here affirmed (178 U. S., 476).

Cosmos Exploration Co. v. *Gray Eagle Oil Co.*, 112 Fed., 4, 12.

The essential requirements, as was said both by the Land Department and by the circuit court of the United States for the southern district of California in the case of these identical selections, to be complied with by a person seeking title to a tract of land in lieu of land covered by a patent in a forest reservation, are: (1) That he must relinquish to the Government the tract in a forest reservation and submit satisfactory evidence respecting title thereto; (2) that he must make selections of the tract desired in exchange for the tract relinquished, and accompany the selection by an averment on oath showing the selected land to be of the condition and character subject to selection.

If it be once admitted, or if it be, as we think, clearly established, that the construction of the Land Department is correct in respect of what character of lands is subject to selection, then the Land Department, as a judicial tribunal, proceeding according to the ordinary methods of judicial procedure, is not compelled to take cognizance of any application to select

lands which upon its face fails to show that the selector is proceeding to take that which he is permitted to take. If the application showed, for example, that the selector's proceedings were instituted to obtain land which must be admitted by everybody not to be subject to selection, it is obvious that such an application, although no protest against it should be filed, would not put the machinery of the Land Department into operation at all, nor would it call upon the Land Department to exercise its functions in granting the relief sought, viz, the issuance of a patent in exchange. In a word, the action of the Land Department can not be invoked except by such averments as show upon their face a state of facts sufficient in law to invoke its jurisdiction. It is necessary for the selector to make out a case.

The true construction of the act and the consequent validity of the regulations made for its enforcement in accordance with that construction, being once established, upon the failure of the selector (Clarke) to make the jurisdictional averments thus validly required to enforce the true construction (inasmuch as no duty is imposed upon the Land Department to take a single step further toward the determination of the possible legality of the proposed selection), no title can vest in the selector in the fulfillment or completion of that which the Land Department is under no duty to fulfill or complete. And here, before any attempt was made to supply such averments (as, for example, by the belated mineral affidavit of the following year), it had become patent to the Land Department that the lands were in truth mineral lands.

It is therefore also vain for the petitioner now to claim that the facts entitling him to a patent are set forth in the petition, even if such were the case, for the tribunal to which he was to apply for the patent and to which he was to make known the facts which entitled him to it was the Land Department; and that Department was called to act upon the showing made to it then, and not upon the allegations contained in the petition for a writ of mandamus. We have already, we think, shown that such showing did not make a case for the action of the Department.

For the reasons set forth above, we respectfully submit that the decision of the court below should be affirmed and the petition for the writ of mandamus be denied.

JOHN S. CHAPMAN,
Special Assistant to the Attorney-General,
HENRY H. GLASSIE,
Assistant United States Attorney.

WILLIS VAN DEVANTER,
Assistant Attorney-General.

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In the Supreme Court of the United States.

OCTOBER TERM, 1902.

THE UNITED STATES OF AMERICA ON THE relation of the Riverside Oil Company, a corporation, plaintiff in error,
v.
ETHAN A. HITCHCOCK, SECRETARY OF THE Interor.
} No. 632.

SUPPLEMENTAL BRIEF FOR DEFENDANT IN ERROR.

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SUPPLEMENTAL BRIEF FOR DEFENDANT IN ERROR.

Counsel for the defendant in error, not wishing to construe the leave granted to file supplemental briefs into permission to reargue the case at length, are unable to follow counsel for the plaintiff in error through the detail of their reply brief. Inasmuch, however, as one or two things therein contained seem to be particularly misleading, we will trespass upon the attention of the court to the extent of pointing out briefly wherein we deem the misconception to lie.

I.

It is said "that the Land Department acts (quasi) judicially and finally only with respect to questions of fact." And again it is argued conversely "that the Land Department can not act judicially *because* its determination of such question is not final, but always subject to review." (Reply brief, p. 1.)

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Apart from the manifest *non sequitur* in assuming that because it is not final it can not be judicial, it is clear that the statement that the Land Department acts judicially and finally only with respect to questions of fact is a combination of two distinct propositions: (1) The Land Department acts (quasi) judicially only with respect to questions of fact, and (2) that it acts finally only with respect to questions of fact.

The first of these propositions is wholly unsound, as was pointed out in our opening brief, on pages 30 to 37. The Land Department, in deciding upon an application to take public lands, must of necessity construe the law by virtue of which such application is made, and so exercise a judicial function.

The second proposition, that the decision upon a question of law is not final, is true only in the sense and to the extent that where, upon an admitted state of facts, the Land Department has, under a mistaken construction of the law, issued a patent to A, when under a true construction of the law it should have issued it to B, a court of equity having territorial jurisdiction over the land itself will, upon a direct proceeding for the purpose, declare A to hold the title in trust for B and decree that he convey it to B accordingly. Such an attack is not collateral, but direct. (*Lee* v. *Johnson*, 116 U. S., 48, 49.)

But the power of the supreme court of the District of Columbia upon an application for a writ of mandamus is an altogether different matter. It has no power to determine land titles in California. Its power is

strictly limited to commanding the performance of a simple, definite ministerial duty. It has no power to construe statutes for the Land Department and to impose the construction upon that Department. It may, indeed, inquire whether the Land Department is acting within the scope of its jurisdiction, as in *Noble* v. *Union River Logging Co.* (147 U. S., 165, 176, 177). But jurisdiction being conceded to be in the Land Department, the court of the District has no power to decide anything for the Land Department or to do for that Department any adjudicative act or to substitute its own construction for the construction of the Department. Speaking of the ordinary duties of the head of an executive department, this court has said:

> He must exercise his judgment in expounding the laws and resolutions of Congress under which he is from time to time required to act. * * * If a suit should come before this court which involved the construction of any of these laws, the court certainly would not be bound to adopt the construction given by the head of a Department. And if they supposed his decision to be wrong, they would, of course, so pronounce their judgment. But their judgment upon the construction of a law must be given in *a case in which they have jurisdiction*, and in which it is their duty to interpret the act of Congress, in order to ascertain the rights of the parties in the case before them. The court could not entertain an appeal from the decision of one of the Secretaries, nor revise his judgment in any case where the law authorized him to exercise

> discretion or judgment. Nor can it by mandamus act directly upon the officer, and guide and control his judgment or discretion in the matters committed to his care in the ordinary discharge of his official duties. (*Decatur* v. *Paulding*, 14 Pet., 497, 515.)

While the courts are empowered to construe the acts of Congress whenever they are involved in cases properly before them, this does not confer the power to *create* a case for the very purpose of making such construction. If the statute be one which an executive officer must exercise judgment and discretion in order to administer, the construction of it is a part of his administrative duty. For the performance of this duty of construction, involving as it does the exercise of judgment and discretion, the executive officer is free from interference and control. Mandamus lies against him only when his action involves no such function. Unless it be plainly and definitely ministerial, the court has no jurisdiction over him. The mere circumstance, then, that in some case within its general jurisdiction the court would be at liberty to construe the same statute is a wholly insufficient ground for assuming a jurisdiction for the purpose of imposing a construction. The construction can be given only in a case in which jurisdiction is already present. To hold otherwise is to hold that courts may sit on appeal upon the whole administrative business of the Executive.

Applying the same rule to the duties of the Commissioner of Pensions, this court again said:

> He adopted an interpretation of the law adverse to the relator, and his decision was confirmed by the Secretary of the Interior as evidenced by his signature of the certificate. Whether if the law were properly before us for consideration, we should be of the same opinion, or of a different opinion, is of no consequence in the decision of this case. We have no appellate power over the Commissioner, and no right to review his decision. That decision and his action taken thereon were made and done in the exercise of his official functions. They were by no means merely ministerial acts. (*United States ex rel. Dunlap* v. *Black*, 128 U. S., 41, 48, 49.)

If the supreme court of the District has not this power in respect of the executive departments in general, *a fortiori*, it has it not in respect of a department to which Congress has expressly confided judicial functions. (*Gaines* v. *Thompson*, 7 Wall., 347, 353.)

In this latter case the finality of the land department's construction of the statute, so far as review upon applications for mandamus or injunction in courts of the District of Columbia are concerned, is conclusively established; and the distinction between such a review and a direct proceeding in a court having jurisdiction over the lands to decree the equitable title to belong to the person against whom the department had decided, and to compel the conveyance of the legal title accordingly, is expressly marked out. (Ibid., pp. 353, 354.)

In this connection it may be observed that none of the

cases upon which the plaintiff in error relies in respect of the finality of the land department's decision are cases of mandamus or injunction against the Secretary of the Interior. The statement that the land department acts finally only with respect to questions of fact, and that its decisions on questions of law are subject to review, is altogether misleading unless it be strictly limited to the sort of proceeding which we have already pointed out. They are not subject to review in the supreme court of the District of Columbia.

II.

It is also stated in the reply brief that the land department has no power to determine controverted questions of fact upon *ex parte* affidavits; and that the court of appeals erred in failing to distinguish between the administrative function of the land department and its *quasi* judicial function; which latter function, it is said, does not come into operation until a case is made by a contest between rival claimants. (Reply brief, p. 1, pp. 32–37.)

So far as the interests of the United States are concerned this supposed distinction between the administrative and the judicial functions of the department is purely illusory.

In passing upon the application of a private individual to take lands belonging to the public domain, the Land Department always and everywhere acts judicially. Regarded from the standpoint of rival claimants such an application by one individual is, in a sense, *ex parte;* but in its main and important aspect

as an attempt to appropriate that which is, and would otherwise remain, a part of the public domain, such an application is adversary. It is not the right of a third party but the right of the Government which is in question.

Weber v. *Shappell*, 1 L. D., 76, 77;
Condon v. *Arnold*, 2 L. D., 96, 97.

So, when a contestant fails to prosecute an appeal and thus abandons the contest, the Land Department has still jurisdiction to consider the evidence whether or not an entry should be canceled. (*In re Rynerson*, 7 L. D., 177, 180.)

It is of no consequence that the Department to which is confided the decision of the applicant's claim is also the Department to which is confided the protection of the Government's interest. In point of fact it is this very duty to protect the Government interests that makes every proceeding in the Land Department an adversary proceeding.

> The Secretary is the guardian of the people of the United States over the public lands. The obligations of his oath of office oblige him to see that the law is carried out, and that none of the public domain is wasted or is disposed of to a party not entitled to it. He represents the Government, which is a party in interest in every case involving the surveying and disposal of the public lands. (*Knight* v. *U. S. Land Asso.*, 142 U. S., 161.)

I.

> It is no answer to say that third parties are not concerned, for the Government is an interested party, and the Secretary of the Interior is in duty bound to see that the disposition of every part of the public domain is in accordance with law, and the regulations of his Department. *Witherspoon* v. *Duncan*, 4 Wall., 218; *Lee* v. *Johnson*, 116 U. S., 48; *Williams* v. *United States*, 138 U. S., 48; *Hyde et al.* v. *Warren et al.*, 14 L. D., 576, 587.

The application of this principle to the case at bar is perfectly obvious. The act of June 4, 1897, provides that a person having certain qualifications may, by doing certain things, obtain in lieu of land of a certain character other lands of a certain character belonging to the public domain.

Being the tribunal to which is confided the care and custody of the public domain as well as the decision and determination of the rights of the persons seeking the benefit of this law, the Land Department has clearly the power to say what allegations, evidence, or proof will be sufficient, will satisfy it that the conditions prescribed by the act for the taking of this part of the public domain have been complied with. It is its duty to see that no part of the public domain is disposed of to a person not entitled to it. It is equally its duty to see that no person shall take any part of the public domain to which he is not entitled. It says to the applicant: Relinquish the land by a sufficient deed; show me that you are the owner and have a

clear title; produce an affidavit that the land you propose to select is unoccupied and nonmineral and so vacant land open to settlement; and if there is no contest by any other private claimant and nothing to put me upon notice that your statements do not truly represent these facts, these allegations will satisfy me and you shall have a patent.

But these things the selector declined to do; and the very decision of the Land Department which he now seeks to overturn, was to this effect: "You have not presented the proofs which I said would satisfy me; therefore, your selection is not complete; and now, by your admission as to the nature as well as to the condition of the land, you can never furnish such proofs, and your selection must always remain defective and incomplete."

III.

The third point which we desire to comment upon is that the petition for mandamus alleges that the lands in question are vacant and that the defendant in error does not deny that allegation.

But the court will observe that the petition for mandamus does not state that the application to the Land Department alleged that the lands were vacant. This case must be determined upon what was alleged and made known to the Land Department in the proceeding invoking the jurisdiction of that Department. If the lands were, in truth, vacant and unoccupied at the time of selection, the Land Department was the place to make that fact known. And it was because

the selector failed and refused, when presenting his selection, to make that fact known that the Secretary was constrained to hold that the selection was incomplete and defective, and insufficient to authorize the issuance of a patent. Being incomplete no title could possibly vest as of its date. No patent then could lawfully issue upon it. And, as we have already many times pointed out, the selection remaining incomplete up to the time of the hearing before the Secretary, the then undisputed fact that the lands in question were occupied, that mining operations were going on upon them and that petroleum in immensly paying quantities was then being pumped out of them, precluded the possibility that the defective selection could ever be completed by the required proof.

That the present averment by the plaintiff in error is of no importance to the true decision of this case and requires no denial by the Secretary is confirmed by the plaintiff in error itself, when, in another part of the reply brief, it insists that the "Secretary did not, and could not, upon the case presented by the appeal from the Commissioner's action, determine that the lands in question were not vacant lands open to settlement at the time of selection." (Reply brief, p. 34.)

But how is the Secretary to be required to admit or deny that which he was not called upon and could not have been called upon to consider or determine? The Secretary has no personal knowledge of the lands or as to whether they were, on December 14, 1900, unoccupied and nonmineral and so vacant lands

open to settlement. All he knows he knows officially by reason of the proofs before him, and in his return in answer to the demand that he should be forced to issue a patent, he says to the selector in effect, "You failed to inform me when you made this selection that the lands were unoccupied and nonmineral. The protestants informed me upon oath that they were both occupied and mineral. Having failed to make the required proof of the facts upon which it depended, your selection was manifestly incomplete. From your admissions on the final hearing before me it became plain that you could never make them complete. It is immaterial whether you are now willing to say in the supreme court of the District of Columbia what you failed to say before me."

JOHN S. CHAPMAN,
Special Assistant to the Attorney-General.
HENRY H. GLASSIE,
Assistant United States Attorney.

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Supreme Court of the United States.

No. 632.—October Term, 1902.

The United States of America on the Relation of The Riverside Oil Company, Plaintiff in Error,
vs.
Ethan A. Hitchcock, Secretary of the Interior.

In error to the Court of Appeals of the District of Columbia.

[May 18, 1903.]

The relator, plaintiff in error, filed its petition in the Supreme Court of the District of Columbia, asking for a writ of mandamus to compel the defendant, the Secretary of the Interior, to vacate a certain order made by him rejecting selections of land by one Clarke, and to compel the defendant to order such selections passed to patent and to cause to be prepared and presented for signature to the proper officers of the United States of America a patent for the selected land, or for such other relief as might be proper. The court denied the petition, and from that judgment the relator appealed to the Court of Appeals of the District, which, after a hearing, affirmed the judgment of the court below. The relator has brought the case here by writ of error.

The petition for the writ filed in the court below, in addition to various conclusions of law, made the following averments of fact:

On October 28, 1898, one C. W. Clarke was the owner in fee of certain land in the State of Oregon covered by a patent from the United States to his grantors, which is described in the petition, and the land was situated in a forest reservation in that State, designated as the Cascade Range Forest Reservation. On the day above mentioned Clarke executed a deed, which conveyed in fee and relinquished to the United States the land above described, and the deed was surrendered to the register and receiver of the proper land office and received and accepted by them. Certain land was thereupon selected by Clarke, which land had been duly surveyed and classified as agricultural land prior to the selection, and appeared on the records of the Land Department as agricultural land, subject to disposition under the act of June 4, 1897, relating to forest reserve lands. A copy of the material portion of that act is set forth in the margin in the case immediately preceding, *Cosmos &c. Co.* v. *Gray Eagle Co.*, page —.

After the selection of the land the register certified that the land thus selected in lieu of the land relinquished to the United States was free from conflict, and that there was no adverse filing, entry or claim thereto, and he

thereupon entered the selected land upon the records and tract books of the land office. The Land Department thereafter required Clarke (without authority of law as averred) to publish a notice of his selection for a period of sixty days, and the register forwarded all the papers to the Commissioner of the General Land Office, together with his above-mentioned certificate, and reported to that office that publication had been ordered pursuant to the circular of the General Land Office of December 18, 1899. Clarke complied with the requirements of the department and published the notice, and on February 6, 1900, before the sixty days had expired, the Kern Oil Company filed in the local office a protest against the selection, with accompanying affidavits, which protest and affidavits were also thereupon forwarded to the General Land Office. The petitioner avers that the protest was insufficient to constitute an issue as to whether or not the land selected by Clarke was vacant land open to settlement at the time of such selection, and it was averred that the protestant, by reason of the non-discovery of mineral in the land, was wholly without standing as an adverse claimant under the law and practice of the Land Department.

On January 2, 1900, Clarke duly conveyed by deed the selected land to the petitioner, and it thereby became vested with all of Clarke's rights in and to the land, and it is still the owner thereof and entitled to demand and receive from the United States a patent therefor. The petitioner then filed in the General Land Office a motion to dismiss the protest.

It was then averred that at the time of the selection by Clarke no other person had any right, title or interest, vested or inchoate, in or to the land so selected, and that the persons mentioned in the protest and affidavits and alleged to have been upon the land as locators at or before the time of the selection by Clarke, and under whom the protestant asserted rights, were pretended explorers for minerals who had made no discovery of minerals upon the land or any part thereof, but had merely staked off pretended mining claims for the purpose of deceiving others and discouraging and defeating them from acquiring title to such land under the land laws, and that such staking off initiated no lawful right, inchoate or vested, under such land laws.

The hearing was had before the Commissioner of the General Land Office, and a decision in the matter was given by him, by which he held that the title of the selector did not vest until approval by the Commissioner, and that the land in the selection was yet open to exploration under the mining laws, and if at the date of the decision the land is shown to be mineral it defeats the selection.

From this decision the petitioner appealed to the Secretary of the Interior, and assigned among other things that the Commissioner erred in not sustaining the motion to dismiss the protest and in not passing the land selected to patent, and that he also erred in ordering a hearing and in not

holding that the showing of the tract books and land records at the date of the selection governed the character of the land for the purpose of the selection, and also in holding that a discovery of mineral upon the land selected subsequent to the selection and before approval by the Commissioner would defeat such selection; that the Commissioner also erred in calling upon the selector to demand a hearing and assume the burden of proof upon the question of the character of the land, and in directing that at such hearing, if demanded, the character of the land subsequent to the selection should be embraced in the issue.

On April 25, 1901, the defendant rendered a decision in the matter, wherein, as averred, he held that questions respecting the class and character of the selected land were to be determined by the conditions existing at the time when all requirements necessary to obtain title have been complied with by the selector; that the mere recital in one of the forms approved by the respondent, of an accompanying non-mineral aud non-occupancy affidavit, constituted a regulation of the department requiring the filing of such affidavit as a condition precedent to the vesting of selector's title; that such alleged regulation was binding upon selector's forest reserve lieu land; that the affidavits filed by the selector Clarke failed to allege non-occupancy, and therefore he had not complied with the requirements necessary to obtain title; that since the said selection by Clarke valuable deposits of mineral petroleum oil had been discovered, and that in view of the alleged admitted occupancy subsequent to the said selection and the subsequently discovered value of the land for mining purposes, it was apparent that the required proofs of the then non-mineral character and non-occupancy of the land could not then be supplied; that therefore the selections must be rejected.

The petition averred that the defendant vacated the order of the Commissioner directing a hearing, and arbitrarily, wrongfully and unlawfully attempted to reject the selections and destroy the vested rights of Clarke and his grantees.

The protest mentioned in nowise questioned the sufficiency in substance and form of the selection made by Clarke, nor was the point of the alleged insufficiency of the affidavit raised by the Commissioner of the General Land Office in his decision of December 18, 1900, and the United States has in nowise notified the selector of any defect in the exchange, and there is no issue in the record charging a failure to comply with the law.

The affidavits, though not essential to the validity of the contract of exchange tendered by Congress, and accepted and completed by the relinquishment and selection aforesaid, did in law and in fact allege the non-occupancy of the land as understood in the law and the practice of the Land Department, as they expressly negative all the elements of legal occupancy.

A motion for a review of the hearing was made and granted, and was thereafter had before the Assistant Attorney General of the United States for the Interior Department.

On April 12, 1902, the defendant rendered a decision, adhering to the ruling already given, ignoring the curative effect of supplemental affidavits of non-occupancy, and denied the motion for a review.

By this decision the Secretary of the Interior erroneously held and decided that the land selected was not "vacant land," though in truth and in fact unoccupied, and such vacancy and lack of occupancy was not shown by an affidavit of selector, made and filed at the time and as a part of the selection; that the defendant erroneously held and decided that, in order to be vacant land within the meaning of the act of 1897, the selected land must not only be free from the presence of any one on the land as a matter of fact, but must be shown to be free from such presence of any one on the land at the date of selection by an affidavit of selector. It was then alleged that in fact there was no person present on the selected land at the time of the selection; that the decision of the Secretary of the Interior on review turned solely on a question of law, and not on any question of fact or on any question of mixed law and fact, and that the only question of law involved is the meaning of the act of June 4, 1897, and the particular words therein, "vacant land open to settlement."

The defendant arbitrarily refused to pass the selection to patent, and has arbitrarily ordered the case of the selector dismissed from his docket solely because of the alleged absence from the record of selection of a non-occupancy affidavit, and not because of any ground or cause of objection to the selection set up in said protest.

In conclusion, the petitioner prays for a writ of mandamus to command the defendant "to forthwith recall and vacate his said order rejecting said selections of said Clarke, and if said selections have already been cancelled to vacate and recall said cancellation and reinstate the proceedings relating to the said selections, and thereupon to proceed therein as required by law, and to order said selections passed to patent, and cause to be prepared and presented for signature to and by the proper officer of the United States of America a patent or patents for the said selected lands, and that the petitioner may have such other or further relief as the premises warrant and to the court may seem meet."

To this petition the defendant made answer, admitting many averments in the petition, and setting up the facts as understood by the defendant, as follows: The defendant averred that Clarke did file his deed with the local land officers and assumed to select other land under the act of June 4, 1897; that a form of application to select land under the act had been prescribed by the Commissioner of the General Land Office in April, 1898,

and approved by the Secretary of the Interior, and was in force when the selection was made, and which form contained, among other things, the following clause:

"There are also submitted certificates from the proper officers showing that the land relinquished or surrendered is free from incumbrance of any kind, also that all taxes thereon to the present time have been paid, and an affidavit showing the lands selected to be non-mineral in character and unoccupied."

It is then averred that the allegations showing the land selected to be non-mineral in character and unoccupied was an essential averment, for the reason that, unless the lands were non-mineral in character and unoccupied, the same were not vacant lands open to settlement within the intent and meaning of the act of 1897.

The regulation was not complied with and no evidence of non-occupancy was given, and the allegation contained in the proposed form as to the non-mineral character of the land, was not complied with, as it was stated by the selector in this case that his affidavit as to the character of the lands was made "upon the evidence found upon the surface of the ground, and that the affiant does not undertake to express any opinion as to what may be under the ground."

The answer then set up the facts as to the protest of the Kern Oil Company and the various hearings and decisions of the Commissioner and the Secretary, in substance as set forth in the petition.

The defendant then averred that by the laws of the United States the duty was imposed upon him to construe the acts governing the disposition of the public lands of the United States, and in pursuance of the duties so imposed upon him he was required to construe and apply the terms of the act of Congress of June 4, 1897, and that in the exercise of his judgment and discretion in that behalf he did construe the term, "vacant land open to settlement," as meaning to exclude land in the actual occupation of any person or persons under the local customs or rules of miners which are by the statute incorporated into and have become part of the laws of the United States; that, in the exercise of his proper duty and function as Secretary of the Interior, the defendant decided that, by reason of the failure of Clarke to show in due and proper form that the lands were at the date of selection subject to selection as "vacant land open to settlement," the attempted selection thereof must be rejected, and it thereupon became and was unlawful for this respondent as such Secretary to order any patent or patents to the said lands to issue to the said Clarke as in the said petition prayed to be commanded.

To this answer the petitioner demurred on the ground that the same was insufficient and bad in form and substance. After the demurrer was overruled the petitioner elected to stand by it, and the court thereupon adjudged

that the rule to show cause should be discharged, the prayer of petitioner denied and the petition itself dismissed.

Mr. Justice PECKHAM, after making the foregoing statement of facts, delivered the opinion of the Court.

We have set out in the foregoing statement of facts, at very great length, a large portion of the contents of the petition and answer in this case. It has been done for the purpose of showing by the record itself the questions of law arising therefrom. Upon a perusal of the record it appears that those questions are not merely formal ones nor are they so plain as not to require the careful judgment of any tribunal to which they may be referred for decision. Their solution was properly submitted to the Land Department, which had full and complete jurisdiction over the matters arising under the act of June 4, 1897, and it thereby became the duty of the officers of that department to decide them. As is said in *Knight* v. *United States Land Association* (142 U. S. 161):

"The Secretary is the guardian of the people of the United States over the public lands. The obligations of his oath of office oblige him to see that the law is carried out, and that none of the public domain is wasted or is disposed of to a party not entitled to it. He represents the Government, which is a party in interest in every case involving the surveying and disposal of the public lands."

Congress has constituted the Land Department, under the supervision and control of the Secretary of the Interior, a special tribunal with judicial functions, to which is confided the execution of the laws which regulate the purchase, selling and care and disposition of the public lands.

Neither an injunction nor mandamus will lie against an officer of the Land Department to control him in discharging an official duty which requires the exercise of his judgment and discretion. (*Marquez* v. *Frisbie*, 101 U. S. 473; *Gaines* v. *Thompson*, 7 Wall. 347; *United States* v. *Black*, 128 U. S. 40; *United States* v. *Windom*, 137 Id. 636.)

In *Decatur* v. *Paulding*, (14 Pet. 497,) it was held that, in general, the official duties of the head of one of the executive departments, whether imposed by act of Congress or by resolution, are not mere ministerial duties. The head of an executive department of the Government in the administration of the various and important concerns of his office is continually required to exercise judgment and discretion. He must exercise his judgment in expounding the laws and resolutions of Congress under which he is from time to time required to act.

That the decision of the questions presented to the Secretary of the Interior was no merely formal or ministerial act is shown beyond the necessity of argument by a perusal of the foregoing statement of the issues presented by this record for the decision of the Secretary. Whether he

decided right or wrong, is not the question. Having jurisdiction to decide at all, he had necessarily jurisdiction, and it was his duty to decide as he thought the law was, and the courts have no power whatever under those circumstances to review his determination by mandamus or injunction. The court has no general supervisory power over the officers of the Land Department, by which to control their decisions upon questions within their jurisdiction. If this writ were granted we would require the Secretary of the Interior to repudiate and disaffirm a decision which he regarded it his duty to make in the exercise of that judgment which is reposed in him by law, and we should require him to come to a determination upon the issues involved directly opposite to that which he had reached, and which the law conferred upon him the jurisdiction to make. Mandamus has never been regarded as the proper writ to control the judgment and discretion of an officer as to the decision of a matter which the law gave him the power and imposed upon him the duty to decide for himself. The writ never can be used as a substitute for a writ of error. Nor does the fact that no writ of error will lie in such a case as this, by which to review the judgment of the Secretary, furnish any foundation for the claim that mandamus may therefore be awarded. The responsibility as well as the power rests with the Secretary, uncontrolled by the courts.

Neither the case of *Roberts* v. *United States*, (176 U. S. 221,) nor that of *American School of Magnetic Healing* v. *McAnnulty*, (187 U. S. 94,) decides anything opposing these views.

In the *Roberts case* it was simply decided that the duty of the Treasurer to pay the money in question in that case was ministerial in its nature and should have been performed by him on demand, and that, therefore, mandamus was the proper remedy for his failure to do it.

In the *McAnnulty case* it was held that the order of the Postmaster General to the postmaster in the city of Nevada, not to deliver the mail to the relator, was not a justification for such refusal, because the order was given without authority of law, and the postmaster could, notwithstanding such order, be compelled by mandamus to do his duty and deliver the mail. The case has no relevancy to the one in hand.

We are so clearly of opinion that the decision of the defendant in this case was judicial in its nature that further argument upon the subject is needless.

The judgment of the Court of Appeals of the District of Columbia is

Affirmed.